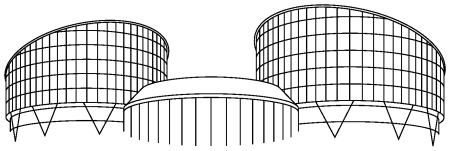

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF FALZON v. MALTA

(Application no. 45791/13)

JUDGMENT

STRASBOURG

20 March 2018

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 Falzon v. Malta,

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

Ganna Yudkivska, *President,*
Vincent A. De Gaetano,
Paulo Pinto de Albuquerque,
Faris Vehabović,
Egidijus Kūris,
Carlo Ranzoni,
Marko Bošnjak, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 6 February 2018,

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

PROCEDURE

1. The case originated in an application (no. 45791/13) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Maltese national, Mr Michael Falzon ("the applicant"), on 8 July 2013.

2. The applicant was represented by Dr T. Comodini Cachia, a lawyer practising in Valletta. The Maltese Government ("the Government") were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicant alleged a breach of Article 10 as a result of the domestic courts' judgments fining him for defamation.

4. On 27 August 2015 the complaint concerning Article 10 was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1945 and lives in Naxxar.

A. Background to the case

6. The applicant served as a member of parliament between 1976 and 1996, and he served as a government minister between 1987 and 1996. Even

before he was elected to Parliament he had already established himself as a political commentator in the media and regularly authored opinions related to national politics which were published in national newspapers. Upon his retirement from Parliament the applicant began writing weekly opinion columns in the newspaper *Maltatoday* and another weekly paper.

7. On 6 May 2007 Dr Michael Falzon (referred to hereinafter as M.F., for ease of reference – as he has the exact same name as the applicant), the deputy leader of the Malta Labour Party (MLP), delivered a speech in public, which was reported on the national media. During the speech he informed the public that he had received an anonymous email and threatening letters, in respect of which he had complained directly to the Commissioner of Police (CoP). He furthermore referred to the discussion he had had with the latter during which he had asked him to investigate the issue.

8. The most relevant parts of the speech read as follows (translation done by the Registry):

> "...But the fact that today, one opens the newspaper *Illum*, front page, and reads the editorial by S.B., who chose to speak about a pending police investigation, about an anonymous email that I received and about a threatening letter that I received... this is a level which should not be acceptable in our country. And whoever is behind these stories – wherever he might be – and let me be clear – wherever he might be – he should be ashamed...ashamed!
>
> ...
>
> Yes I received an anonymous email...and I received threatening letters last November. I did not disclose this to my family. Today they were told by *Maltatoday*...I can tell them myself...But when something illegal occurs, I go to the police. And that's what I did. And I went to the CoP, since people who put forward such stories can disclose them I can also do so now for everyone to know. So I went to the CoP. I will tell you what I told him...and he will confirm it. He told me: 'What will we do, Mike, if it were to [turn out to] be X or Y?' I told him: 'I am telling you as of now, Mr R. Be it whosoever in this country, I am authorising you as from now, in advance, even before you start the investigation, to proceed. Because what is illegal, I condemn it, and we as a party always condemned illegality.
>
> And we come to [the subject of] the anonymous email [*U wasalna fuq email anonima*].
>
> And today ... K.S.N. [a journalist], this person phoned me yesterday as well, told me 'But you know, this is an innocuous email, it contains nothing.' And I tell K.S.N. and [other purveyors of] this type of journalism, that when they saw [that] there is a police investigation, is it you, you decide what is illegal and what is not [?]
>
> Because [he was] an admirer. And [the sender] of this email, true. I will speak to him, of course. But note, that he sent it anonymously! Generally admirers tell you, 'Hi, Mike, is everything alright?' They do not write anonymously. And K.S.N said other things as well, and so did S.B. [the editor of *Maltatoday*]. Among other things he said - because he knows a lot - he also phoned me yesterday, and I told him. I told him: 'You are breaking the law. It is now up to the police'. He also said that apparently - apparently - from the investigation into the email conducted by the police, nothing had emerged, and that it will stop there. And I will tell him now in

public: 'Mr K.S.N. and Mr S.B., you have not discovered America!' Words to that effect have been said by an employee of our party for weeks...at the Centre...for weeks. And he told me that I will make a fool of myself. I will not interfere. I will not interfere with the police investigation. That is for them to see.

But yesterday I told the CoP, and Inspector C., that such discourse had long been doing the rounds at the Centre [party club]. I gave [them] the names, and it is now up to the police to decide whether to find out where this information originated from, and who is deciding matters in this country."

9. On the same day K.S.N., a journalist, published an article in the newspaper *Illum*, entitled "Email sent to M.F. brings admirer before the Police". The article started off by stating that an innocent email sent to the deputy leader of the MLP had been passed on to the police, who in turn had identified the sender and subsequently questioned him. It concluded with the statement that when M.F. was asked about him reporting the matter to the police, the deputy leader of the MLP (that is to say M.F.) replied that "he would not confirm nor deny" that he was aware of the case.

10. On 13 May 2007 *Maltatoday* published an opinion by the applicant entitled "Policing one's enemies", prompted by the above-mentioned speech, in which the applicant queried the manner in which the two main political parties perceived the police force. The article's opening paragraphs read as follows:

"During a recent short visit to London, I had the opportunity to watch the film *'The Lives of Others*' (original title: *Das Leben Anderen* [*sic*]) an Academy Award-winning German movie, set in the 1984 cultural scene of East Berlin, monitored by secret agents of the Stasi: the secret police of the former German Democratic Republic (East Germany). The film puts the methods of the Stasi at the centre of the plot and as a result clearly exposes their repulsive behaviour.

The police force, I believe, is simply responsible for making sure that people obey the law, for protecting people and property and for arresting criminals. Using the police in a different context and for the purpose of controlling people's freedoms is the basic notion of the typical police state, even if you insert the word 'democratic' in your country's official title.

For me, the biggest unease was caused by the realisation that the film was set in a period that is only some twenty-two years ago, which in Malta corresponds to the Mintoff [former Labour Party leader and Prime Minister] years when I was already active in politics. Little did I think that events that were to unfold when I was back in my country would make me wonder whether the PN [Nationalist Party] and the MLP look at the duties of the police in somewhat different manner."

11. Other relevant parts of the article, read as follows:

"I say this with deep regret, but I can only be seriously perturbed by the ease with which MLP Deputy Leader Michael Falzon [M.F.] persuaded the Commissioner of Police to investigate the source of a trivial and unimportant anonymous e-mail that he had received. More so, when this e-mail could only have been misguidedly considered 'suspicious', and even then in an absolutely far-fetched way, in the context of the infighting and internal feuds within the MLP.

According to what Dr. Michael Falzon [M.F.] said, the Police Commissioner - who apparently is on familiar first name speaking terms with Dr. Falzon [M.F.] - asked whether he would proceed in the same fashion whether the culprit eventually proved to be X or Y; implying that the Commissioner was offering to act in a discriminatory way according who the 'guilty' person was.

Matters are even more worrying because when the police successfully traced the original writer and dispatcher of the e-mail, they impounded his computer and obliged him to go and sign daily at the Police Headquarters even though he was not accused of any crime.

Has not MLP Deputy Leader Michael Falzon [M.F.] successfully used the Police Force to control the freedom of an innocent, law-abiding private citizen whom he suspected could be a political enemy? And has not somebody in the police force abused of his powers by condescending to do this for the advantage of the faction led by Michael Falzon [M.F.] in the MLP's internal squabbles? Why should the police force interfere in Labour's internal politics where, it is obvious, there are too many cooks spoiling the broth?"

...

"Yet the ease with which the MLP Deputy Leader phones him up to complain, and - even worse - the ease with which this leading politician is provided with a service that cannot be linked in any way with the pursuit of 'criminality' - as we know it - makes one wonder."

...

"These events seem to indicate that within Labour there are people who can influence and interfere in decisions taken by the Police Force. This is happening when they are still in Opposition. Asking what would happen in this area, once they are in government is, therefore, a legitimate question."

...

"So what is the Government doing about this? Does the MLP Deputy Leader who happens to be my namesake, carry more weight and influence with the Commissioner of Police than the Deputy Prime Minister who is politically responsible for the Police Force?"

...

"I firmly believe that Tonio Borg [then Minister of Interior] should set up a high powered inquiry with the specific task of getting to the bottom of this sordid soap opera. He owes it to those who dedicated the best years of their life to ensure the personal freedom of each and every citizen of Malta. He owes it to all present and future Maltese citizens who did not live the past - so that they will live in a future where no one controls their freedom and hence their lives."

B. Libel proceedings

12. On 17 July 2007 M.F., the deputy leader of the MLP, instituted libel proceedings against the applicant (and against the editor of the newspaper) under Article 28 of Chapter 248 of the Laws of Malta (see the "Relevant domestic law" section below), and sought damages, claiming that the above-mentioned extracts of the article had been defamatory.

13. By way of defence the applicant claimed that (a) the published article had contained his opinion and had consequently constituted a fair comment and the expression of a value judgment, (b) any facts had been substantially correct and based on what had been declared publicly by M.F. himself a few days prior to the impugned publication, and (c) the claimant was a person occupying a public office and was consequently bound to accept a wider level of criticism.

14. During the proceedings the Court of Magistrates heard the testimony of the plaintiff (M.F.), the CoP, the applicant, the editor (S.B.), and two other journalists (A.B.D. and K.S.N.). It saw documentation submitted consisting of an email exchange between the MLP deputy leader and a third person (J.B.), as well as the transcript of the deputy leader's speech and copies of two articles, both entitled "Email sent to deputy leader brings an admirer before the Police" (one having been published online and one in print).

15. The CoP testified as follows (as summarised by the first-instance court):

- He denied that M.F. had persuaded him or influenced him in respect of his doing his job in connection with the case at issue;

- M.F. had requested and obtained a normal appointment with the CoP; when they met M.F. had showed him a letter which the CoP considered to be "injurious and full of threats" towards M.F.; the latter requested the CoP to investigate the contents of the letter;

- M.F. also informed the CoP that he had received an email, which was later passed on to the CoP, following an invitation to do so by the same CoP;

- The CoP asked M.F. whether he intended to initiate proceedings against the person who should result to be responsible, given that the prosecution of such a crime would require the injured party to lodge a complaint;

- The documents which had been passed on to the CoP had in turn been passed on to the Criminal Investigation Department (C.I.D.) for further investigation, and the CoP had had no further contact with M.F. concerning the case, which had not been given any particular priority on his part.

16. The applicant failed to make written submissions within the stipulated timeframe, and his late submissions were not accepted by the court that proceeded to judgment.

17. By a judgment of 4 May 2010 the Court of Magistrates found the applicant guilty of having defamed the deputy leader of the MLP and was ordered to pay him 2,500 euros (EUR) in damages. Costs were also to be paid jointly by the applicant and the editor (who was also ordered to pay EUR 1,000 in damages).

18. The court referred to the CoP's witness testimony to explain the factual situation. In its view, while noting that public figures such as politicians were subject to wider limits of acceptable criticism, they were

nevertheless protected under Article 10 § 2 – their protection having to be weighed in relation to the interests of the open discussion of political issues. The court considered the article defamatory as it had tarnished and impinged on the claimant's reputation. It rejected the applicant's defence, noting that it had not been proved that: i) M.F. had manipulated the CoP due to the political office that he held in the party in which he militates; ii) that with his actions M.F. had offended the Police Force since he used the Police Force for his personal aims; iii) that M.F. was some *deus ex machina* who pulls the strings of the Police Force, from behind the scene, to reach his goals.

19. The applicant appealed.

20. By a judgment of 6 October 2010 the Court of Appeal (in its inferior jurisdiction) rejected the appeal and confirmed the first-instance judgment. It considered it appropriate to analyse and mention all the relevant evidence that had not been referred to by the first-instance court:

- M.F., as plaintiff and now respondent, submitted that the reader had been induced to believe that he had persuaded the police to harm someone, when all he had done was to file a report requesting that the anonymous letters and emails he had received be investigated.

- The court also referred to the statements made by the CoP (see above).

- The applicant (appellant before the Court of Appeal) explained that in his view the email received by M.F. had been innocuous and that M.F. had thus reacted disproportionality. According to the applicant, from the speech delivered by M.F. publicly (at the Labour Centre in Rabat), it transpired that there was a certain familiarity between him and the CoP; indeed if that had not been so M.F. would have reported the incident at a police station like an ordinary citizen, and not with the CoP. In his view it was natural to question whether M.F. had used the CoP in connection with the internal affairs of the party. Even when cross-examined, he reiterated that influence had been exerted by M.F. on the CoP.

- The editor testified that in his opinion the speech delivered by the deputy leader of the MLP indicated that the latter had put pressure on the CoP to investigate the matter when he had met up with him to discuss the emails and the anonymous letters.

- In reply to a question, while being cross-examined, as to whether M.F. had put pressure on the CoP, K.S.N. replied that he was aware that a report had been filed concerning the email and that on the same day of publication, M.F. had declared that he was authorising the CoP to institute proceedings against whomever turned out to be the culprit.

21. The Court of Appeal was of the view that, having examined all the relevant evidence and thus gaining an understanding of the circumstances preceding and surrounding the article, the applicant's assumption could not be considered as constituting fair comment. In the eyes of the ordinary reader, the comments and criticism made by the applicant could not be

considered as objectively reasonable, made in good faith and balanced, given that they were based on a certain assumption – that M.F. had exercised influence over the CoP with the aim of controlling people's freedom; the attack on M.F. had thus exceeded the limits of just criticism. M.F. had had every right to file a report, and the fact that he was politically active had not justified such an attack, which had not been corroborated by factual evidence. It considered that even though the manifestation of free expression was an established principle, that freedom was to be exercised within those just limits of the canon of objective veracity of facts and restraint (*entro l-limiti ġusti ta' dak il-kanoni tal-verita' oġġettiva tal-fatti u tal-kontinenza*), as elaborated by the most progressive doctrine and jurisprudence on topical issues and the exercise of criticism.

C. Constitutional redress proceedings

22. On 9 March 2011 the applicant instituted constitutional redress proceedings complaining that he had suffered, *inter alia,* a breach of Article 10 of the Convention as a result of the judgments in the libel proceedings. He argued, in substance, that his opinion piece had consisted of criticism, which was a legitimate manner of expressing an opinion about the work of a public figure and was allowed in a democratic society - noting that the extensive protection given to such a public figure served to silence free expression. He further claimed that the ordinary courts had referred to insinuations and allegations which had not been made or implied by the applicant in his article, such as the statement by the Court of Magistrates to the effect that M.F. had "manipulated" the CoP or that the latter had been subjected to pressure which had "impeded the exercise of his function" as well that M.F. "was a *deus ex macchina* pulling the strings of the Police Force". The applicant emphasised that these were gratuitous inventions by the ordinary court which had not been mentioned in the article.

23. By a judgment of 30 March 2012 the Civil Court (First Hall) in its constitutional competence dismissed the applicant's claims.

24. It considered that the applicant was attempting to obtain a revision of the ordinary proceedings and noted that it was not quite true that the applicant had never implied that M.F. had "manipulated" the CoP - indeed his article had precisely questioned "has not the MLP deputy leader MF successfully used the Police Force to control the freedom of an innocent law-abiding private citizen whom he suspected could be a political enemy?". In any event, even if the applicant considered the statements made by the Court of Magistrates in its reasoning to be invented, this had not constituted a breach of his Article 10 rights.

25. The court noted the reference to the Stasi with which the applicant had started his article and his narrative of M.F.'s actions, which had resulted in an individual being investigated and subsequently having his computer

seized. In that context he had asked whether M.F. had "used" the police against a political opponent. The applicant criticised the CoP for following up on the indications given by M.F., to the extent that the applicant had called on the Minister of the Interior to look into the matter. Indeed, the CoP was also an object of the applicant's criticism.

26. According to the court, the word "uses" did not mean "manipulate", as implied by the Court of Magistrates, but within the context of the article at issue, it nevertheless implied an element of abuse. The criticism against M.F. was that he had taken advantage of his political position to put pressure on the police in order that the latter would take action in persecuting an innocent citizen. The court considered that it was legitimate for a victim of a crime to complain to the police, and then it was for the police to act on the matter. Further, the initial reference to the "Stasi" in the opening of the article had been regrettable; even if it was not intended to do so, it had given the impression of a comparison being made.

27. In its view, even accepting that a public person was subject to greater limits of acceptable criticism, given the article at issue, the ordinary courts had not failed to strike a fair balance between the competing rights.

28. The applicant appealed.

29. By a judgment of 11 January 2013 the Constitutional Court dismissed his appeal.

30. It noted that the ordinary court judgments and the penalty inflicted constituted an interference with the applicant's rights under Article 10, which had been prescribed by law (Article 28 of the Press Act). It emphasised the importance of free expression for the press; nevertheless, it noted that the press could not exceed certain limits and had to exercise its function in a manner consistent with its obligations and responsibilities particularly as regards the reputation and rights of others. Acknowledging that politicians were subject to wider limits of acceptable criticism, it nevertheless noted that they remained holders of their right to the protection of their reputation. The quest for reasonableness and proportionality in such circumstances had to be seen against the background of the importance of public debate.

31. Noting the difference between facts and value judgments (the latter not being subject to the need for proof), it considered that a person could not hide behind an opinion or value judgment to impute untrue facts in respect of other persons. It considered that the Court of Appeal had reached a legitimate conclusion in finding that the applicant's opinion piece had contained declarations which assumed as a fact that the MLP deputy leader had illegitimately and abusively influenced the police and also that the exercise of illegitimate and abusive pressure on the CoP had not been proved as a fact.

32. The Constitutional Court noted that while the article had contained a series of questions (in respect of which the applicant argued that it was for

the reader to answer), it had also contained assertions, some of which had not reflected the real facts, according to the Court of Appeal. Further, the Constitutional Court considered that just because an alleged fact was given the form of a question, this did not entail that it was no longer a factual assertion but rather became a value judgment. Even the way in which the question was posed, namely "Has not M.F. ..." clearly included a factual affirmation and clearly invited a positive reply. Similarly, the quest "Does the MLP Deputy Leader, who happens to be my namesake, carry more weight and influence with the Commissioner of Police than the Deputy Prime Minister, who is politically responsible for the Police Force?" was nothing but an allegation of fact in the form of a question.

33. Lastly, the Constitutional Court noted that the amount of the fine had not been particularly severe, so much so that the quantum had not been appealed. There was therefore no violation of Article 10.

II. RELEVANT DOMESTIC LAW

34. Section 3 of the Press Act, in so far as relevant, states that a press offence is committed by means of the publication or distribution in Malta of printed matter. Under Section 11 of the same Act, whosoever by such means libels any person, shall be liable to a fine upon conviction. Section 28 of the Act reads as follows:

> "(1) In the case of defamation, by any means mentioned in article 3, the object of which is to take away or injure the reputation of any person, the competent civil court may, in addition to the damages which may be due under any law for the time being in force in respect of any actual loss, or injury, grant to the person libelled a sum not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87).
>
> (2) In any case to which this article applies, the defendant may, in mitigation of damages, prove that he made or offered to make an apology to the plaintiff for such defamation before the commencement of the action for damages or, as soon afterwards as he had an opportunity of doing so in case the action shall have been commenced before there was an opportunity of making or offering such apology:
>
> Provided that the defendant shall not be allowed to make such proof in mitigation of damages if he has raised the plea of justification in terms of article 12."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

35. The applicant complained under Article 10 of the Convention that the domestic courts had failed to distinguish between facts and value judgments. Furthermore, his criticism was directed towards a politician and

concerned an issue of general interest, and thus no fair balance had been reached in the case at issue. The invoked provision 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. 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."

A. Admissibility

36. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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

(a) The applicant

37. The applicant accepted that the interference in question had been provided for by law, namely the Press Act, but according to him it had been disproportionate. In this connection the applicant submitted that the judicial review carried out by the domestic courts had been narrow in scope since they had based themselves on their subjective interpretation of the article and had not explained why the right to reputation of M.F. had outweighed the applicant's freedom of expression. Moreover, the domestic courts had failed to consider other relevant factors, such as the applicant's good faith, the fact that the article had constituted a value judgment and the factual considerations upon which the opinion had been based.

38. The applicant argued that the article had not been offensive, shocking or disturbing but that it had simply been a political analysis of the speech delivered by M.F. at his party's political rally. It had been clearly presented by the newspaper as an opinion of a political analyst and not as a journalistic report of facts.

39. He further argued that the domestic courts had ignored the fact that both he and M.F. were public figures and that each of them had to allow a fair share of criticism in their regard due to their involvement in politics.

The domestic courts had also disregarded the context in which the article had been published – a highly political one in the run-up to the general elections of March 2008 – following the above-mentioned speech by M.F. and media reports of a personal phone call between the CoP and the Labour Party President. In the applicant's view, the latter had formed the factual basis of the commentary and the language used in the article had clearly distinguished between the part of the article constituting the value judgment and the part thereof constituting the factual basis of the applicant's opinion. However, the domestic courts, rather than verifying whether his value judgment had been made in good faith and on a factual legal basis, had assumed bad faith and demanded evidence of the truth of the applicant's opinionated analysis.

40. Furthermore, the article had raised questions on an issue of general interest, namely the relationship between the police force and politicians (and more specifically, the members of the Labour Party). It concerned the basic foundation of any democracy and aspects of the rule of law. The article consisted of his opinion, his own thoughts, questions, analysis and conclusions, also in the light of his own personal experience of Malta's political history of democracy and how he perceived the participation of the Labour Party in that history. The article had constituted a value judgment relying on information which had already been in the public sphere, and most of which had been placed in the public sphere by M.F. himself and confirmed by him. The applicant should therefore not have been required to prove underlying facts beyond the speech delivered by M.F.

41. Moreover the applicant had been cautious in his use of the expressions "I say with deep regret", "implying", "make me wonder", "these events seem to indicate", and in posing a number of questions, leaving the reader to come to his own conclusion. The applicant was questioning the implications of what M.F. had stated himself.

42. Finally the applicant acknowledged that the State enjoyed a certain margin of appreciation in establishing the balance between freedom of expression and the protection of the reputation of others. In the applicant's view, however, in connection with the protection of the reputation of politicians the pressing social need justifying the interference could be found only where the criticism had gone beyond what was acceptable in political debate. The margin of appreciation found its limits in the needs of society for political debate and for political commentary undertaken in good faith and developed on a factual basis. Indeed, the applicant's opinion pieces always related to current affairs, generally as a consequence of political discourse or action and were written responsibly. Nevertheless, in the absence of a pressing social need the domestic courts had opted to protect the politician (M.F.) in not having his words and actions questioned, as opposed to the applicant's freedom of expression to question those actions.

(b) The Government

43. The Government submitted that the interference was provided for by law, namely Section 28 of the Press Act, and had pursued a legitimate aim, namely the protection of the reputation and rights of others (M.F.).

44. As to the proportionality, making reference to the Court's case-law, the Government stressed that the Court extended the protection of the reputation of others even to politicians who were not acting in their private capacity. A politician who levelled defamatory criticism against a political opponent (even in a parliamentary debate) was not exempt from proving the factual basis of his criticism.

45. The Government argued that the applicant's statements could not be covered by that certain acceptable degree of exaggeration or provocation which is normally attributed to journalists and that the interference had been proportionate since the applicant had not been requested to prove the truth of his value judgments but solely the veracity of his statements of fact.

46. In this connection, the Government submitted that although the article had appeared in the newspaper under the title of "Opinion", nonetheless the passages quoted from the article "were not limited to value judgments but if anything such opinions were based on facts attributable to M.F." Thus, the applicant was obliged to prove the veracity of such underlying facts.

47. According to the Government, even though M.F. was a public figure and, as a politician, was subject to a wider margin of acceptable criticism than private individuals, nonetheless this did not allow the press to make statements for the truth of which there was no evidence.

48. The Government pointed out that during the libel proceedings a number of witnesses (including M.F., the CoP, the editor of the newspaper, another journalist, and the applicant) had been heard and that in the domestic judgment ample reference had been made to the evidence submitted in order to establish whether the words and expressions used by the applicant could be considered to constitute fair comment. The domestic courts had made it clear that in the case of opinions expressed in newspapers, in so far as those opinions referred to facts, the latter had to be verified by the journalist. In the opinion of the domestic courts the article at issue had relied on the applicant's subjective factual assumptions, which had not been proven and therefore did not fall within the sphere of fair comment. The domestic courts had made a distinction between facts and value judgments and found that the facts attributed to M.F. were untrue. The Government noted that everyone could file a report with the police and that the article had contained a number of declarations which attributed unjust influence by M.F. on the CoP which did not reflect the truth. They noted that while a number of questions had been put, the article had also contained statements which were unproven. Moreover, a statement of fact could not be proved on the grounds that the statements were based on information in the

public sphere. The speech made by M.F. had not proved those statements, as it had only informed the public that a report had been filed with the CoP.

49. Bearing in mind that the Convention afforded a certain margin of appreciation to the State when it came to the protection of the rights of others under Article 10 § 2 of the Convention, the Government considered that the strong and unfounded statements of the applicant on the alleged behaviour of M.F. had justified the moderate sanction in the form of civil libel damages that the State had imposed on the applicant. The interference had thus been proportionate.

2. The Court's assessment

50. It is common ground that the impugned measures – the outcome of the libel proceedings - constituted an interference with the applicant's right to freedom of expression. Nor is it disputed that the interference was "prescribed by law" (specifically, Section 28 of the Press Act) and pursued a legitimate aim (namely "the protection of the reputation or rights of others" – in this case the deputy leader of a political party). The Court sees no reason to doubt that these two conditions for regarding the interference as permissible under the second paragraph of this Article were fulfilled. It remains to be determined whether the interference was "necessary in a democratic society".

(a) General principles

51. According to the Court's case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among many other authorities, *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I, and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

52. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with Court supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by

Article 10 (see *Pentikäinen v. Finland* [GC], no. 11882/10, § 87, ECHR 2015). What the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (ibid.). In addition, the fairness of the proceedings, the procedural guarantees afforded and the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 171, ECHR 2005-XIII).

53. Furthermore, regard must be had to the pre-eminent role of the press in a State governed by the rule of law (see *Castells v. Spain,* 23 April 1992, § 43, Series A no. 236). Whilst the press must not overstep the bounds set, *inter alia*, for "the protection of the reputation of ... others", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 89, ECHR 2015 (extracts)). The press is a vector for disseminating debates on matters of public interest, but it also has the role of revealing and bringing to the public's attention information capable of eliciting such interest and of giving rise to such a debate within society (ibid., § 114).

54. At the same time, the protection afforded by Article 10 of the Convention to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism (see *Pentikäinen*, cited above, § 90, and the case-law cited therein). Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it "duties and responsibilities", which also apply to the press. These "duties and responsibilities" are liable to assume significance when there is question of attacking the reputation of private individuals and undermining the "rights of others" (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III).

55. The Court has consistently held that when examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the "protection of the reputation ... of others", it may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the

other the right to respect for private life enshrined in Article 8 (see, among many other authorities, *Annen v. Germany*, no. 3690/10, § 55, 26 November 2015 and *Cheltsova v. Russia*, no. 44294/06, § 79, 13 June 2017). The Court emphasises that, in order for Article 8 of the Convention to come into play, an attack on a person's reputation must attain a certain level of seriousness and its manner must cause prejudice to personal enjoyment of the right to respect for private life. The criteria which are relevant when balancing the right to freedom of expression against the right to respect for private life include: the contribution to a debate of general interest; how well known is the person concerned and what is the subject of the report; his or her prior conduct; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed (see, for example, *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 83 and 89 to 95, 7 February 2012; *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 108 *et sequi*, ECHR 2012; *Couderc and Hachette Filipacchi Associés*, cited above, § 93; and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 88, ECHR 2017).

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

56. In the present case it is for the Court to examine whether the domestic courts have struck a fair balance when protecting two values guaranteed by the Convention, namely, the right to respect for private life under Article 8 against the right to freedom of expression under Article 10. To start with the Court is not convinced, in the circumstances of the present case, that the impugned statements could be considered as an attack reaching the requisite threshold of seriousness and capable of causing prejudice to M.F.'s personal enjoyment of private life.

57. As to Article 10, which guarantees freedom of expression to "everyone", it has been the Court's practice to recognise the essential role played by the press in a democratic society (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 165, ECHR 2016). The Court has previously established that the press, as well as NGOs, exercise watchdog functions and that the function of bloggers and popular users of the social media may be also assimilated to that of "public watchdogs" in so far as the protection afforded by Article 10 is concerned (ibid., § 166 and 168). The manner in which public watchdogs carry out their activities may have a significant impact on the proper functioning of a democratic society (ibid., § 167). In the present case, the applicant being a regular opinion writer in two weekly publications, the interference must therefore be examined in the context of the essential role of a free press in ensuring the proper functioning of a democratic society (see, among many other authorities, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02

and 36448/02, § 62, ECHR 2007-IV), as also acknowledged by the Constitutional Court (see paragraph 30 above).

58. A fundamental distinction needs to be made between reporting details of the private life of an individual and reporting facts capable of contributing to a debate in a democratic society – relating to politicians in the exercise of their official functions, for example (see *Couderc and Hachette Filipacchi Associés*, cited above, § 118). In the present case the impugned article did not refer to an aspect of M.F.'s private life as such but rather his behaviour as a politician. There is no doubt that the behaviour of a politician and the possible consequences, if any, on the public and third parties, are matters of public interest. Indeed questioning the behaviour of a politician and holding the latter to account undoubtedly contributes to a debate of general interest for Maltese society as a whole. In this connection the Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate concerning questions of public interest (see *Bédat v. Switzerland* [GC], no. 56925/08, § 49, ECHR 2016 and *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 144, ECHR 2016 (extracts)).

59. M.F. was a politician who inevitably and knowingly laid 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 (see *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103). Moreover, it was M.F. who brought the original matter to the public's attention. Indeed he delivered a speech in public, which was reported by the national media, during which he informed the public that he had received an anonymous email and threatening letters, in respect of which he had complained directly to the CoP, and disclosed details of their discussion (see paragraph 8 above) (compare *Feldek v. Slovakia*, no. 29032/95, § 81, ECHR 2001-VIII).

60. It was mainly through M.F.'s speech that the applicant obtained the background information on which his article was based. Furthermore, previous articles, which had been written on the matter, were also referred to by M.F. in his speech. The Court emphasises the importance that it attaches to journalists' observance of their duties and responsibilities, and to the ethical principles governing their profession. As to whether the applicant acted in good faith and made sure that the article was written in compliance with ordinary journalistic obligations to verify factual allegations, the Court reiterates that this obligation requires the journalist to rely on a sufficiently accurate and reliable factual basis which can be considered proportionate to the nature and degree of the allegation, given that the more serious the allegation, the more solid the factual basis has to be (see, *inter alia*, *Björk Eiðsdóttir v. Iceland*, no. 46443/09, § 71, 10 July 2012). The Court has already expressed its views about the level of seriousness of the

allegations (see paragraph 56 above). In any event, as to the accuracy of the impugned article a lot depends on the content and the form of the article.

61. In connection with the latter the Court notes that while referring to a distinction between statements of facts and value judgments the Constitutional Court, confirming previous instances, found that the opinion piece contained declarations presented as fact which had not been proved and factual assertions in the form of a question which had not reflected real facts (see paragraphs 31 and 32 above).

62. The Court accepts that the opening paragraphs of the article contained an implied comparison of the claimant's actions with the plot of the film there mentioned. They thus constituted a value judgment that represented the applicant's subjective appraisal of the claimant's actions (compare *Zakharov v. Russia*, no. 14881/03, § 30, 5 October 2006) and as such were not susceptible of proof. Furthermore, the impugned expressions, although sarcastic, remained within the acceptable degree of stylistic exaggeration employed to express the applicant's value judgment (see, *mutatis mutandis*, *OOO Izdatelskiy Tsentr Kvartirnyy Ryad v. Russia*, no. 39748/05, § 43, 25 April 2017).

63. As to the statements of fact that M.F. had received the email and threatening letters and complained about them to the CoP, the Court notes that the veracity of such statements has not been disputed domestically. Nor does it appear to be untrue, given the declarations of M.F. in public and the witness testimony of the CoP. The declarations made by M.F. and the CoP also give a factual basis to the allegations that there was a certain ease in filing the complaint directly with the CoP instead of at the local police station, and that there was a certain familiarity between them - enough for them to be on first-name terms, as noted in the article. It also does not transpire that the subsequent steps taken by the police *vis-à-vis* the original writer of the email as described were untrue. It follows that in reproducing those facts the applicant was providing reliable and precise information as required by the ethics of journalism.

64. In relation to the statements set out in question format, the Court notes that the domestic courts attributed to them meanings which had not been explicitly set out and in consequence considered that they were untrue factual assertions. The Court reiterates that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. Consequently, it is not for this Court, or for the national courts for that matter, to substitute their own views for those of the press as to what reporting technique should be adopted by journalists. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see, with further references, *Bédat*, cited above, § 58). In that light, the Court takes issue with the decisions of the domestic courts concerning unuttered statements, and their decisions to consider certain statements as factual (which they claimed had not been proved), as opposed

to value judgments. Indeed, the Court's case-law has shown a broad and liberal interpretation of "value judgments" when it comes to journalistic freedom on matters of public interest, particularly concerning politicians (see, for example, *Unabhängige Initiative Informationsvielfalt v. Austria*, no. 28525/95, §§ 9 and 41, ECHR 2002-I, and *Desjardin v. France*, no. 22567/03, §§ 42, 48-49, 22 November 2007).

65. In the Court's view, by using a style which may have involved a certain degree of provocation, it is plausible that the applicant was raising awareness as to the possibility of any abuse being perpetrated by the deputy leader of the party in opposition, and that he was calling for action by the minister in charge (compare *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 66, Series A no. 239, where the Court considered that the principal purpose of the article was to urge the Minister of Justice to set up a body to investigate complaints of police brutality). He was thus expressing his concerns on a matter of public interest. It is true that even 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 *De Haes and Gijsels v. Belgium*, 24 February 1997, *Reports of Judgments and Decisions*, § 47, and *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II). However, in the instant case the factual basis at issue is to be found in the deputy leader's own speech, which he made in public (compare, *Brasilier v. France*, no. 71343/01, §§ 38 and 41, 11 April 2006). Thus, in the Court's view, the questions posed by the applicant, which appear to have been the main reason of his condemnation by the domestic courts, were legitimate questions having a sufficient factual basis: M.F.'s own speech. Nothing in the article suggests that the applicant was acting in bad faith.

66. Furthermore, despite the lack of any concrete findings concerning any effect on M.F.'s private life, the domestic courts finding against the applicant ordered that he pay an award of damages of EUR 2,500, which could have a chilling effect.

67. In conclusion, the Court considers that in the defamation proceedings the domestic courts did not appropriately perform a balancing exercise between the need to protect the plaintiff's reputation and the Convention standard, which requires very strong reasons for justifying restrictions on debates on questions of public interest. The domestic courts' decisions, very narrow in scope reiterating what, in their view, was implied by the impugned statements and requiring proof thereof, and upholding the right to reputation without explaining why this outweighed the freedom of expression of the applicant, and without taking into consideration other factors relevant to this balancing exercise, cannot be considered to have fulfilled the obligation incumbent upon the courts to adduce "relevant and sufficient" reasons that could justify the interference at issue.

68. There has accordingly been a violation of Article 10 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

70. The applicant claimed 2,500 euros (EUR) in respect of pecuniary damage representing the fine he was made to pay and EUR 5,000 in respect of non-pecuniary damage.

71. The Government submitted that an award in respect of non-pecuniary damage should not exceed EUR 3,000.

72. The Court observes that, in the present case, it has found a violation of the applicant's rights, as guaranteed by Article 10 of the Convention. It considers that there is a clear link between the violation found and the pecuniary damage caused to the applicant. Accordingly, in respect of pecuniary damage, it awards the applicant EUR 2,500, plus any tax that may be chargeable on that amount. The Court further awards the applicant EUR 4,000 in respect of non-pecuniary damage.

B. Costs and expenses

73. The applicant also claimed a total of EUR 9,239.49 for the costs and expenses incurred before the domestic courts (as per the bill of costs submitted to the Court, together with supporting receipts) and the Court.

74. The Government considered that costs for proceedings before the Court should not exceed EUR 1,000.

75. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above-mentioned criteria, the Court considers it reasonable to award the sum of EUR 6,340, covering costs under all heads.

C. Default interest

76. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

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*
   (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:
      (i) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (iii) EUR 6,340 (six thousand three hundred and forty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above-mentioned amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

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

Done in English, and notified in writing on 20 March 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Ganna Yudkivska
Deputy Registrar	President