GRAND CHAMBER

**CASE OF MEDŽLIS ISLAMSKE ZAJEDNICE BRČKO AND OTHERS v. BOSNIA AND HERZEGOVINA**

*(Application no. 17224/11)*

JUDGMENT

STRASBOURG

27 June 2017

*This judgment is final but it may be subject to editorial revision.*

In the case of Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

András Sajó, *President,*  
 Işıl Karakaş,  
 Angelika Nußberger,  
 Khanlar Hajiyev,  
 Luis López Guerra,  
 Mirjana Lazarova Trajkovska,  
 Nebojša Vučinić,  
 Vincent A. De Gaetano,  
 André Potocki,  
 Paul Mahoney,  
 Faris Vehabović,  
 Egidijus Kūris,  
 Iulia Motoc,  
 Jon Fridrik Kjølbro,  
 Mārtiņš Mits,  
 Stéphanie Mourou-Vikström,  
 Gabriele Kucsko-Stadlmayer, *judges,*  
and Søren Prebensen, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 31 August 2016 and 16 March 2017,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1.  The case originated in an application (no. 17224/11) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by the Brčko Branch of the Islamic Community of Bosnia and Herzegovina (*Medžlis Islamske zajednice Brčko*), the Bosniac Cultural Society “*Preporod*” (*Bošnjačka zajednica kulture “Preporod”*), the Bosniac Charity Association “*Merhamet*” (*“Merhamet” Humanitarno udruženje građana Bošnjaka Brčko Distrikta*) and the Council of Bosniac Intellectuals (*Vijeće Kongresa Bošnjačkih intelektualaca Brčko Distrikta*) (“the applicants”) on 21 January 2011. As stated by the applicants, the first applicant is a religious community of Muslims in the Brčko District (BD)[[1]](#footnote-1) and the remaining applicants, non-governmental organisations of ethnic Bosniacs[[2]](#footnote-2) in Brčko District, Bosnia and Herzegovina.

2.  The applicants were represented by Mr O. Mulahalilović, a lawyer practising in Brčko District. The Government of Bosnia and Herzegovina (“the Government”) were represented by their Agent at the time, Ms M. Mijić.

3.  The applicants alleged, in particular, that their right to freedom of expression had been violated as a result of judicial decisions in defamation proceedings which had been brought against them.

4.  The application was assigned to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). In a judgment delivered on 13 October 2015 a Chamber of that Section unanimously declared the application admissible, and found by a majority that there had been no violation of Article 10 of the Convention. The Chamber was composed of Guido Raimondi, President, Päivi Hirvelä, George Nicolaou, Ledi Bianku, Nona Tsotsoria, Krzysztof Wojtyczek, Faris Vehabović, judges, and also Françoise Elens-Passos, Section Registrar. Three judges (George Nicolaou, Nona Tsotsoria and Faris Vehabović) expressed a joint dissenting opinion. On 8 January 2016, under Article 43 of the Convention, the applicants requested the referral of the case to the Grand Chamber. The panel of the Grand Chamber acceded to this request on 14 March 2016.

5.  The composition of the Grand Chamber was subsequently determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

6.  Both the applicants and the Government submitted further written observations on the merits (Rule 59 § 1). In addition, third-party comments were received from Centre de recherche et d’études sur les droits fondamentaux (CREDOF) at the University of Paris West Nanterre-la Défense and the association Blueprint for Free Speech, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

7.  A hearing took place in public in the Human Rights Building, Strasbourg, on 31 August 2016 (Rule 59 § 3).

8.  There appeared before the Court:

(a)  *for the Government*  
Ms M. Mijić, *Agent*,  
Ms S. Malešić, *Assistant to the Government Agent*,  
Mr P. Đurasović,   
Ms D.Tešić, *Advisers*;

(b)  for the applicants  
Mr O. Mulahalilović, *Counsel*,  
Ms L. Murselović,   
Mr I. Šadić,  
Mr E. Fazlić, *Advisers,*  
Mr S. Ravkić, *Representative of an applicant*.

9.  The Court heard addresses by Ms Mijić and Ms Murselović, and also their replies to questions put by the judges.

THE FACTS

I.  THE CIRCUMSTANCES OF THE CASE

A.  Letter from the applicants to the highest authorities in the Brčko District

10.  On an unknown date in May 2003 the applicants wrote a letter to the highest authorities of the BD, namely the International Supervisor for BD, the President of the Assembly of BD and the Governor of BD, while the procedure for the appointment of a director of the BD’s multi-ethnic public radio station was still pending. In the letter, they voiced their concerns regarding the procedure for the appointment of a director of the BD’s multi-ethnic public radio station. They criticised the authorities for having disregarded the principle of proportional representation of ethnic communities in the public service of BD set out in the Statute of BD[[3]](#footnote-3). In this connection they stated:

“...We acknowledge and appreciate your support and the effort you put into creating a multi-ethnic radio ... Unfortunately, it appears that there was a major oversight at the very beginning of this important venture. The panel for the selection of the director [of the radio] was created in contravention of the Statute of Brčko District. It is composed of three Serb[[4]](#footnote-4) members, one Croat[[5]](#footnote-5) and one Bosniac. Thus, yet again, the (BD) Statute, which requires proportional representation of the three constituent peoples in public institutions, was disregarded. Parliament established several cases of non-compliance with this principle regarding employment of staff in the public sector, including the BD radio, to the disadvantage of Bosniacs and Croats, and requested that the Governor correct this imbalance. Unfortunately, nothing has been done to correct this. That this is true is confirmed by the unofficial information that Ms M.S. was proposed for the position of the radio’s director by the Serb members of the (selection) panel, who are in the majority, although the former director was Bosniac. This proposal is unacceptable, all the more so because it concerns a person who lacks the professional and moral qualities for such a position.”

11.  The letter continued as follows:

“According to our information (*našim informacijama*), the lady in question

(1)  stated in an interview published in ‘NIN’[[6]](#footnote-6), commenting on the destruction of mosques in Brčko, that Muslims were not a people (*Muslimani nisu narod*), that they did not possess culture and that, accordingly, destroying mosques could not be seen as destruction of cultural monuments,

(2)  as an employee of the BD radio demonstratively tore to pieces on the radio’s premises (*demonstrativno kidala*) the calendar showing the schedule of religious services during the month of Ramadan,

(3)  on the radio’s premises covered the coat of arms of Bosnia and Herzegovina with the coat of arms of the Republika Srpska,

(4)  as an editor of the cultural programme on the BD radio banned the broadcasting of *sevdalinka[[7]](#footnote-7)* arguing that that type of song had no cultural or musical value.

We firmly believe that the above-described acts absolutely disqualify Ms M.S. as a candidate for the position of director of the multi-ethnic Radio and Television of Brčko District and that a Bosniac should be appointed to that [radio’s director] position, which would be in compliance with the Statute of [BD] and the need to rectify the ethnic imbalance regarding employment in the public sector.

We hope that you will react appropriately to our letter ...

In the absence of any action on your part, we will be forced to address the public (*obratiti se javnosti*) and [to contact] international and other competent representatives.”

12.  Soon afterwards, still in May 2003, the letter was published in three different daily newspapers.

B.  Defamation proceedings against the applicants

1.  Court of First Instance

13.  On 29 May 2003 M.S. brought civil defamation proceedings claiming that in the above letter the applicants had made defamatory statements which had damaged her reputation and discredited her as a person and a professional journalist.

14.  At the trial the first-instance court admitted a considerable volume of evidence, including oral statements from seven witnesses (apparently all employees of the BD public radio) regarding the veracity of the four allegations contained in the applicants’ letter; it also admitted oral statements from the plaintiff and from O.H. and S.C., the members and statutory representatives of two of the applicants.

15.  As described in the judgment of 29 September 2004 (see paragraph 18 below), M.S. stated that she had learned of the letter shortly after it had been sent by the applicants, but that she did not know who had given it to the media. She confirmed that she had removed from the wall in the premises of the radio station the calendar showing the schedule of religious services during the month of Ramadan, but explained that the wall had been used only for work-related announcements. She denied that she had torn up the calendar. As to the coat of arms of Bosnia and Herzegovina, she stated that an invitation card with the coat of arms of Republika Srpska[[8]](#footnote-8) had been placed in a corner of the coat of arms of Bosnia and Herzegovina, but that the latter had not been covered. Lastly, she denied that she had banned the broadcasting of *sevdalinka*. She argued that all those matters had been taken out of context, that her career as a journalist had been thwarted and that she had been concerned about her professional future.

16.  O.H. confirmed that he had participated in the preparation of the letter and stated that he had found out about the information contained therein from employees of the radio station who had asked him for help. There had been no intention to publish the letter. For that reason, it had been sent to the authorities personally. He did not know how the letter had reached the media.

17.  S.C. stated that most of the information had been brought to his attention by O.H. The letter had been sent to the authorities personally. Their intention had not been to publish the letter in the media. That was why they had indicated in the letter that it concerned allegations and not established facts. Their aim had been to draw the attention of the authorities to errors of M.S., who had been a serious candidate for the post of director of the BD radio.

18.  By a judgment dated 29 September 2004, the BD Court of First Instance dismissed M.S.’s action and ordered her to publish the judgment at her expense and to reimburse the trial costs of the applicants. It found that the applicants could not be held responsible because there had been no evidence that they had published the letter in the media. The relevant part of the judgment reads as follows:

“It is clear that the defendants’ letter was addressed personally (*upućeno na ruke*) to the Governor, to the President of the Assembly and to the Supervisor for Brčko District ... and it was not sent to the media ... The court established that the aim of the letter was to bring the attention of the authorities to (these) issues and to enable them to draw certain conclusions on verification of that information, and not to publish unverified information.

Having examined the articles published in the media, the court concludes that none of them was published by [the applicants].”

2.  Court of Appeal

19.  On appeal by M.S., the BD Court of Appeal quashed that judgment on 16 May 2005 and decided to hold a new hearing.

20.  At the hearing before the Court of Appeal M.S. reiterated that the four statements specified above (see paragraph 11 above) had contained untrue and defamatory allegations whose aim had been to portray her as a nationalist and accordingly disqualify her for the post for which she had applied. Not only had she not been appointed to the post, but the letter had had other long-term negative consequences for her.

21.  The applicants argued that they had lacked capacity to be sued because they had not sent the letter to the media and, accordingly, had not expressed or disseminated in public any defamatory statements in respect of the appellant. The letter had been sent to the authorities. By a judgment of 11 July 2007 the BD Court of Appeal dismissed that argument and stated that

“... a person’s reputation can be damaged if someone expresses or disseminates to other people untrue facts or allegations about the past, knowledge, skills or anything else (and he or she knew or ought to have known that those facts or allegations were untrue). For these reasons, the court dismisses the respondents’ arguments that one can be held responsible for defamation only if there was a public announcement or dissemination or publication of (such) statements in the media.”

22.  The applicants further argued that M.S. had been a public servant and that by having taken part in the competition for the position of radio director she had become a public figure. Relying on section 6(5) of the Defamation Act (see paragraph 41 below), the court held as follows:

“... even if the aggrieved party is a public servant or a candidate for a post in a public body and he or she is generally perceived as having an important influence on public issues of political interest ... (a defendant) is to be held liable for defamation if he knew that a statement was false or negligently disregarded its inaccuracy.”

23.  Referring to the first part of the letter (see paragraph 10 above), the BD Court of Appeal did not go beyond noting that it contained value judgments for which no responsibility could be attributed to the applicants under the Defamation Act. It further quoted the four statements contained in the letter (see paragraph 11 above) and held that these “concerned statements of fact which the defendants were required to prove.” In this connection it re-examined O.H., S.C. and the witnesses who had already given oral evidence before the first-instance court (see paragraph 14 above).

24.  The Court of Appeal also noted that R.S. and O.S., both employees of the BD public radio, had visited one of the applicants in order to discuss M.S.’s behaviour in the workplace. On that occasion R.S. had told O.H. that during the month of Ramadan M.S. had detached from the wall in the radio’s premises the calendar showing the schedule of religious services. The court noted that the wall had been used for work-related announcements. It also indicated that, at the relevant time, another text, which had not been work-related, had been posted on the wall. O.S. (sound manager in the radio) had told O.H. that on one occasion M.S. had asked him to explain why *sevdalinka* had been broadcasted during the time reserved in the programme for another type of music. He confirmed that she had removed the Ramadan religious calendar from the wall.

25.  At a meeting held shortly afterwards, O.H. shared the information received from R.S. and O.S. with the other respondents. On that occasion one of the respondents had referred to a newspaper article and the alleged statement of M.S. regarding Muslims and the destruction of mosques. An allegation had been also made that M.S. had covered the coat of arms of Bosnia and Herzegovina with the coat of arms of Republika Srpska. S.C. had confirmed having heard people speaking about that in the city.

26.  After analysing the statements of the witnesses and the respondents, the court found that the facts reported in the letter regarding the calendar of religious services during the month of Ramadan and the broadcasting of *sevdalinka* were untrue, since “the letter obviously did not contain what (R.S. and O.S.) had said about the appellant and her behaviour regarding the religious calendar and the broadcasting of *sevdalinka*”. Noting that the allegation that M.S. was the author of the statement published in the newspaper was untrue, the court stated:

“... on the basis of S.C.’s statement [the court establishes] that at the meeting that preceded the preparation of the letter a distinguished member of a [respondent] had informed those attending the meeting that the appellant had given a statement to the newspaper, whose contents were identical to the contents of the letter. On subsequent verification [S.C.] established that such a text had been published, but that the appellant had not been the author ...”

27.  The court further stated that:

“The respondents also did not prove the truthfulness of the allegation that in her office the appellant had covered the coat of arms of Bosnia and Herzegovina with the coat of arms of Republika Srpska. On the basis of evidence given by the witnesses examined at the trial (B.S., D.N. and K.P.), [the court] established that the appellant had put an invitation card, which bore the coat of arms of Republika Srpska, in the corner of the coat of arms of Bosnia and Herzegovina ...”

28.  In conclusion, the court stated:

“By the letter sent to the Office of High Representative BD - International Supervisor of the BD, the President of the BD’s Assembly and the Governor of the BD, the respondents damaged the plaintiff’s reputation and honour in the place in which she lives and works. They did so by expressing and disseminating to the above persons facts about the appellant’s behaviour, actions and statements which they knew or ought to have known were false ...”

29.  The Court of Appeal ordered the applicants to inform the International Supervisor for BD, the President of the Assembly of BD and the Governor of BD within 15 days that they retracted the letter, failing which they would have to pay jointly the equivalent of EUR 1,280 in non-pecuniary damages to M.S. They were further ordered to give the judgment to the BD radio and television and to two newspapers for publication at the applicants’ own expense. As regards the calculation of the amount of non-pecuniary damages, the court stated:

“When assessing the amount of damages, namely, just satisfaction to be awarded to the appellant, [the court] took into consideration that the impugned facts had been mentioned in the article published in the media ...”

30.  On 15 November 2007 M.S. filed a request with the BD Court of First Instance for enforcement of the above judgment. On 5 December 2007 the Court of First Instance issued a writ of execution.

31.  On 12 December 2007 the applicants paid the equivalent of EUR 1,445 (inclusive of interest and enforcement costs) in enforcement of the judgment of 11 July 2007. On 27 March 2009 the Court of First Instance closed the enforcement proceedings.

C.  Proceedings before the Constitutional Court

32.  On 15 October 2007 the applicants applied to the Constitutional Court of Bosnia and Herzegovina seeking protection of their rights under Article 10 of the Convention.

33.  On 13 May 2010 the Constitutional Court held that the interference with the applicants’ right to freedom of expression had been “necessary in a democratic society” and concluded that there had been no violation of Article II/3.h) of the Constitution of Bosnia and Herzegovina or Article 10 of the Convention. The relevant part of the decision reads as follows:

“34.  At the outset the Constitutional Court notes that the appellants did not deny that their liability for defamation was based on the Defamation Act 2003 and that, therefore, the interference with the right [to freedom of expression] protected by Article 10 of the European Convention was prescribed by law ...

35.  The impugned judgment was delivered in civil defamation proceedings initiated by the respondent against the appellants ... accordingly, the interference pursued the legitimate aim of the protection of the “reputation or rights of others”.

36.  What remains to be determined is whether the interference complained of was ‘necessary in a democratic society’...

37.  With regard to the existence of a ‘pressing social need’, the Constitutional Court observes that the impugned (court) decisions concern the letter which the appellants sent to the authorities of the BD and the Supervisor for BD casting the plaintiff (M.S.) in a negative light. The Court of Appeal considered it to be defamation because (the case) concerned statements whose veracity could be verified ... The Constitutional Court notes that the Court of Appeal qualified the impugned statements in the letter as statements of fact and not as value judgments. The Constitutional Court also considers that they are to be regarded statements of fact which should be proved. The appellants failed to do so, as they did not make reasonable efforts to verify the truthfulness of [those] statements of fact before [reporting], but merely made [those statements].

38.  The Constitutional Court considers that the Court of Appeal established without doubt that the impugned factual statements about M.S. were false and that the appellants were liable for defamation. From the submissions of the two witnesses, from whom the appellants received the information presented in the letter (concerning the part of the letter in which it was stated that M.S. ‘made a point of removing from the wall (and tore to pieces) the calendar with the schedule of religious services during the month of Ramadan and as the editor of the entertainment programme banned the broadcasting of *sevdalinka* arguing that that type of song had no cultural or musical value’), the Court of Appeal established that there was an evident inconsistency between what had been said to the appellants and what they had reported in the letter. Furthermore, the statement in the impugned letter that M.S. had given an interview concerning the destruction of mosques was refuted by another witness, who submitted that subsequent verification had revealed that M.S. had not been the author of the said interview. Finally, the appellants failed to prove the veracity of the allegations that M.S. had covered the coat of arms of Bosnia and Herzegovina with the coat of arms of the Republika Srpska. In view of the above, in the present case the public interest that permits reporting on alleged irregularities in the conduct of public officials cannot be based on manifestly untrue factual allegations which impugn their reputation [and] which cannot be regarded as criticism that they ought to tolerate in view of their function. Accordingly, the court considers that the Court of Appeal correctly concluded that there was ‘a pressing social need’ in the present case [for the interference with the appellants’ right to freedom of expression].

39.  Furthermore, the Constitutional Court notes that the Court of Appeal awarded non-pecuniary damages to M.S. because her reputation was affected by the untrue statements made in the impugned letter ... The Constitutional Court has already stated in its previous case-law that a person’s reputation forms part of his or her personal identity and psychological integrity ...

...

43.  The appellants ... failed to verify the impugned statements beforehand as was their duty. The Court of Appeal established that the appellants had damaged M.S.’s reputation by making untrue allegations which caused her mental distress ...When deciding on the claim in respect of non-pecuniary damage and its amount, the Court of Appeal took into account the purpose of those damages and the rule that it should not favour aspirations that were incompatible with its nature and social purpose.

44.  [T]he Constitutional Court considers that the measure imposed on the appellants in the present case was proportionate to the aim pursued ...The court further considers that the Court of Appeal did not go beyond its discretionary power in deciding on the claim in respect of non-pecuniary damage ... [T]he Constitutional Court finds that the reasons the Court of Appeal gave were ‘relevant’ and ‘sufficient’ within the meaning of Article 10 of the European Convention.

45.  In view of the above, the Constitutional Court considers that the interference with the appellants’ right to freedom of expression was ‘necessary in a democratic society’ and that, therefore, there has been no violation of Article II/3.h) of the Constitution of Bosnia and Herzegovina or Article 10 of the European Convention.”

34.  On 21 September 2010 the Constitutional Court’s decision was served on the applicants.

D.  Other relevant information

35.  According to the minutes of a meeting of the Management Board of the BD’s radio station dated 9 May 2003, there were two candidates for the post of the radio’s director, one of whom was M.S. The Management Board decided to extend the mandate of the acting director of the radio given that “due to political pressure and repeated voting” no decision could be made in respect of either of the candidates.

II.  1995 GENERAL FRAMEWORK AGREEMENT FOR PEACE IN BOSNIA AND HERZEGOVINA (“THE DAYTON AGREEMENT”)

36.  The Dayton Agreement, initialled at the Wright-Patterson Air Force Base near Dayton (the United States of America) on 21 November 1995 and signed in Paris (France) on 14 December 1995, was the culmination of some forty-four months of intermittent negotiations under the auspices of the International Conference on the former Yugoslavia and the Contact Group. It entered into force on the latter date and contains twelve annexes.

37.  Annex 2 of the Agreement concerns the Agreement on Inter-Entity Boundary Line and Related Issues. The relevant part of this Annex reads as follows:

**“**The Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska (the ‘Parties’) have agreed as follows:

...

**Article V: Arbitration for the Brčko Area**

1.  The Parties agree to binding arbitration of the disputed portion of the Inter-Entity Boundary Line in the Brčko area indicated on the map attached at the Appendix.

2.  No later than six months after the entry into force of this Agreement, the Federation shall appoint one arbitrator, and the Republika Srpska shall appoint one arbitrator. A third arbitrator shall be selected by agreement of the Parties’ appointees within thirty days thereafter. If they do not agree, the third arbitrator shall be appointed by the President of the International Court of Justice. The third arbitrator shall serve as presiding officer of the arbitral tribunal.

3.  Unless otherwise agreed by the Parties, the proceedings shall be conducted in accordance with the UNCITRAL rules. The arbitrators shall apply relevant legal and equitable principles.

4.  Unless otherwise agreed, the area indicated in paragraph 1 above shall continue to be administered as currently.

5.  The arbitrators shall issue their decision no later than one year from the entry into force of this Agreement. The decision shall be final and binding, and the Parties shall implement it without delay.”

38.  Annex 4 of the Agreement sets out the provisions of the Constitution of Bosnia and Herzegovina (see paragraph 39 below).

III.  RELEVANT DOMESTIC LAW

A.  Constitution of Bosnia and Herzegovina

39.  The Constitution of Bosnia and Herzegovina (Annex 4 to the General Framework Agreement for Peace) entered into force on 14 December 1995. Article II of the Constitution, in so far as relevant, reads as follows:

“3.  Enumeration of Rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

...

h) Freedom of expression

... ”

40.  In March 2009 the Parliamentary Assembly of Bosnia and Herzegovina adopted Amendment I to the Constitution (published in the Official Gazette of Bosnia and Herzegovina no. 25/09), which, in so far as relevant, reads as follows:

“In the Constitution of Bosnia and Herzegovina, after Article VI(3), a new Article VI(4) shall be added and shall read:

4.  Brčko District of Bosnia and Herzegovina

The Brčko District of Bosnia and Herzegovina, which exists under the sovereignty of Bosnia and Herzegovina and is subject to the responsibilities of the institutions of Bosnia and Herzegovina as those responsibilities derive from this Constitution, whose territory is jointly owned by (a condominium of) the Entities, is a unit of local self-government with its own institutions, laws and regulations, and with powers and status definitively prescribed by the awards of the Arbitral Tribunal for the Dispute over the Inter-Entity Boundary in the Brčko Area. The relationship between the Brčko District of Bosnia and Herzegovina and the institutions of Bosnia and Herzegovina and the Entities may be further regulated by law adopted by the Parliamentary Assembly.”

B.  Defamation Act 2003 (*Zakon o zaštiti od klevete Brčko Distrikta*, Official Gazette of BD no. 14/03)

41.  The relevant provisions of the Defamation Act 2003 of BD read as follows:

Section 2

“...

(a)  the right to freedom of expression, guaranteed by the European Convention on Human Rights..., the Constitution of Bosnia and Herzegovina and the Statute of Brčko District, has a fundamental role in a democratic society, in particular where it concerns matters of political and general interest;

(b)  the right to freedom of expression protects the content of information and the means of transmitting it...

...

Section 6

Whoever causes damage to the reputation of another by asserting or disseminating a falsehood in relation to that person, and by identifying that person to another, shall be liable for defamation.

For a defamatory statement published in the media the responsible persons shall be the author, the editor-in-chief and the publisher, and any other person who in any other way supervised the content of the publication.

Liability for defamation in one of the situations referred to above shall be incurred if a falsehood was asserted or disseminated with malice or negligence.

If a defamatory statement relates to a matter of public interest a defendant shall be liable for defamation if he knew that the statement was false or negligently disregarded its inaccuracy.

The same standard of responsibility referred to above applies in a situation where a defamatory statement was made in relation to a public servant ... or a candidate for public office ...

Exemptions from liability  
Section 7

There is no liability for defamation

(a)  if defamatory statements are value judgments or if they are false only in irrelevant details and are essentially true ...

...

(c)  if the assertion or dissemination was reasonable.

...”

C.  Civil Obligations Act 1978 (*Zakon o obligacionim odnosima*, Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 29/78, 39/85 and 57/8, and Official Gazette of the Republic of Bosnia and Herzegovina nos. 2/92, 13/93 and 13/94)

42.  The relevant provision of the Civil Obligations Act 1978 reads as follows:

Non-pecuniary damages  
Section 200

“The court shall award non-pecuniary damages for physical pain, mental distress caused by loss of amenities of life, disfigurement, damage to reputation, honour, a breach of liberty or the rights of personality or the death of a close relative, and for fear, if it finds that the circumstances of the case, in particular the intensity of the pain, distress or fear and their duration, justify such an award, irrespective of any award of pecuniary damages, and even in the absence of pecuniary damage.

When deciding on a claim for non-pecuniary damages and its amount, the court shall take into account ... the purpose of those damages and the rule that it should not favour aspirations that are incompatible with its nature and social purpose.”

IV.  RELEVANT INTERNATIONAL COMPARATIVE MATERIALS

A.  Resolution 1729 (2010), Protection of “whistle-blowers”, Parliamentary Assembly of the Council of Europe, 29 April 2010

43.  The relevant part of the Resolution reads as follows:

“6.3.  As regards the burden of proof, it shall be up to the employer to establish beyond reasonable doubt that any measures taken to the detriment of a whistle-blower were motivated by reasons other than the action of whistle-blowing.”

B.  Recommendation CM/Rec(2014)7, Protection of whistle-blowers, Committee of Ministers of the Council of Europe, on 30 April 2014

44.  The relevant part of the Recommendation reads as follows:

“II.  Personal scope

3.  The personal scope of the national framework should cover all individuals working in either the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not.

4.  The national framework should also include individuals whose work-based relationship has ended and, possibly, where it is yet to begin in cases where information concerning a threat or harm to the public interest has been acquired during the recruitment process or other pre-contractual negotiation stage.”

C.  Fundamental Principles on the Status of Non-governmental Organisations in Europe, Strasbourg, 13 November 2002, Council of Europe, adopted at multilateral meetings held in Strasbourg between 19 November 2001 and 5 July 2002

45.  The relevant parts of this document read as follows:

“Considering that non-governmental organisations (hereinafter NGOs) make an essential contribution to the development, realisation and continued survival of democratic societies, in particular through the promotion of public awareness and the participatory involvement of citizens in the *res publica*, and that they make an equally important contribution to the cultural life and social well-being of such societies;

...

Considering that their contributions are made through an extremely diverse body of activities which can range from acting as a vehicle for communication between different segments of society and public authorities ...

Recognising that the operation of NGOs entails responsibilities as well as rights,

...

74.  NGOs should be encouraged to participate in governmental and quasigovernmental mechanisms for dialogue, consultation and exchange, with the objective of searching for solutions to society’s needs.”

D.  Code of Ethics and Conduct for NGOs, World Association of Non‑Governmental Organisations (WANGO), 2004

46.  The relevant parts of the Code read as follows:

“C.  Human Rights and Dignity

An NGO should not violate any person’s fundamental human rights, with which each person is endowed.

...

F.  Truthfulness and Legality

An NGO should give out accurate information, whether regarding itself and its projects, or regarding any individual, organization, project, or legislation it opposes or is discussing.

VI.  Public trust

B.  Public advocacy

1.  Accuracy and in context

Information that the organization chooses to disseminate to the media, policy makers or the public must be accurate and presented with proper context. This includes information presented by the NGO with respect to any legislation, policy, individual, organization, or project it opposes, supports, or is discussing ...

2.  Verbal and written statements

The organization shall have clear guidelines and approval processes for the issuing of verbal and written statements.

3.  Disclosure of bias

The organization shall present information in a fair and unbiased manner. Where a possible bias is unavoidable or inherent, it is to be disclosed.”

THE LAW

I.  SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

47.  In their memorials lodged with the Court and oral pleadings before the Grand Chamber, the applicants raised complaints under Articles 6, 9, 10, 13 and 14 of the Convention.

48.  The Government maintained that the present case concerned only the applicants’ complaint under Article 10 of the Convention and that other issues raised by the applicants could not be the subject of examination by the Court.

49.  The Court reiterates that the “case” referred to the Grand Chamber is the application as it was declared admissible by the Chamber (see *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-41, ECHR 2001‑VII; *Janowski v. Poland* [GC], no. 25716/94, §§ 19 and 20, ECHR 1999‑I; *Pentikäinen v. Finland* [GC], no. 11882/10, § 81, ECHR 2015; and *Murray v. the Netherlands* [GC], no. 10511/10, § 88, ECHR 2016).

50.  In the present case it notes that the complaints under Articles 6, 9, 13 and 14 did not form part of the application which was declared admissible by the Chamber in its judgment of 13 October 2015. Accordingly, the Court will limit its examination to the applicants’ complaint under Article 10 of the Convention.

II.  ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

51.  The applicants complained that their punishment, in the context of civil liability for defamation, violated their right to freedom of expression as guaranteed by Article 10 of the Convention, which 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.  The Chamber judgment

52.  The Chamber found that the decisions of the domestic courts amounted to “an interference” with the applicants’ freedom of expression as guaranteed by Article 10 of the Convention, and that such an interference had been “prescribed by law” and pursued a legitimate aim, namely that of the protection of M.S.’s reputation.

53.  It was satisfied that the domestic courts had made a distinction between statements of facts and value judgments and that, relying on the available evidence, they had correctly concluded that the applicants had acted negligently by simply reporting M.S.’s alleged misconduct without making a reasonable effort to verify the accuracy of those allegations. Furthermore, it found that the award of damages made against the applicants had not been disproportionate. It concluded therefore that the domestic courts had struck a fair balance between M.S.’s right to reputation and the applicants’ right to report irregularities about the conduct of a public servant to the body competent to deal with such complaints and that the reasons given to justify their decisions had been “relevant and sufficient” and met a “pressing social need”. Accordingly, it held that there had been no violation of Article 10 of the Convention.

B.  The parties’ submissions

1.  The applicants

54.  The applicants maintained that the impugned correspondence had been a private and confidential letter sent to the competent authorities with a direct institutional interest in the matter. It concerned allegations regarding a prospective candidate for the post of director of the BD public radio, who was to be regarded as a public official. The appointment of the director of the BD public radio was a matter of public concern. Given that the limits of acceptable criticism in respect of public servants were wider, M.S. had to display a greater degree of tolerance. Furthermore, the letter had not contained a definite statement of facts. The authorities had a duty to evaluate “the unofficial information” contained therein and act accordingly.

55.  In their oral pleadings before the Grand Chamber, the applicants submitted that section 6 of the Defamation Act had not been sufficiently precise to enable them to foresee that it applied to their case, which concerned the reporting of irregularities to the relevant authorities. The domestic courts had failed to strike a fair balance between M.S.’s right to reputation and their freedom of expression. According to the applicants, people were entitled, in the discharge of their civic duties, to bring relevant information to the attention of the authorities and to use even harsh and disturbing language in order to prompt them to verify such information and ensure good governance. The authorities had to maintain confidence in civil administration by encouraging citizens to take action in resolving problems in society. Their letter had contained value judgments about M.S.’s professional and moral qualities for the job for which she had applied.

56.  They further submitted that M.S. had suffered no harm. The letter had not been intended for the wider public and they had not sent it to the media. Any responsibility in that respect was to be imputed either to the recipients of the letter or to M.S.

57.  The Court of Appeal had not made any mention of the fact that at the time M.S. had not been a director and accordingly had had no power to remove the calendar of religious services from the wall in the radio station. Furthermore, that judgment had not addressed their arguments that the Statute of the BD had not allowed official symbols (coat of arms) of an Entity of Bosnia and Herzegovina (Republika Srpska, in the present case) to be displayed in the premises of public institutions.

2.  The Government

58.  The Government maintained that the impugned letter contained no indication that it had been of a confidential nature. None of the authorities to whom the applicants had complained had any competence regarding the procedure for the appointment of the BD’s radio director. According to the legislation which had been applicable at the time, the Management Board of the BD radio had been competent to decide on the appointment and dismissal of the radio director.

59.  The Government further submitted that in the impugned letter the applicants had made very serious accusations against M.S., a public servant whose religious and ethnic background had been different from the applicants’ background. The applicants were associations who enjoyed a good reputation and their distinguished members were expected to make some effort to verify the veracity of their statements. The absence of any such effort on their part demonstrated a lack of social responsibility. This concerned in particular their failure to verify whether M.S. had been the author of the interview reported in their letter. The particular circumstances at a time when the ultimate interest in the multi-ethnic society had been to maintain peace and build mutual confidence in post-war Bosnia and Herzegovina had required the applicants to be more vigilant when making such serious accusations. Since the building of public confidence in public institutions and public servants had been of particular importance in the multi-ethnic, post-conflict society that Bosnia and Herzegovina had been at the time, people were required to refrain from making false statements, either intentionally or negligently, in particular if those statements concerned religious or ethnic issues. The applicants, as Bosniac non-governmental organisations, had acted as lobbyists for the Bosniac candidate for the post of the radio’s director. The letter had served at the time as a means of political pressure, which had led the Management Board of the radio not to appoint any of the prospective candidates, that is neither M.S., as a representative of the Serbs, nor the other candidate, who had been Bosniac.

60.  The Government confirmed that the publication of the letter in the media had not been relied on by the domestic courts in finding the applicants responsible for defamation. Since the letter had been leaked to the public, the harm caused to M.S.’s reputation by the communication of unverified and false information to the authorities had been aggravated. The domestic courts had relied on the publication of the letter in determining the amount of non-pecuniary damages awarded to M.S. The Government indicated that letters sent to the authorities in the respondent State were frequently leaked to the public before the authorities could take any measure with respect to the information received. Given that sources of information to the media enjoyed a high level of legal protection, the identity of people who provided “private and confidential information” to the media remained undisclosed.

61.  The Government concluded that the domestic courts, having found for M.S., had struck a fair balance between the competing rights and freedoms, as well as between the legitimate aim pursued and the means employed.

3.  The third-party interveners

62.  In joint submissions CREDOF and the association Blue Print for Free Speech argued that the present case was appropriate to supplement the relevant criteria for the protection of the freedom of speech of whistle‑blowers established in the Court’s case-law. They submitted that whistle-blowers who “report” information to the competent authorities should enjoy equal protection to whistle-blowers who “disclose” information in public. Whistle-blowers who reported alleged irregularities to the authorities by means of private correspondence, as in the present case, should not bear an excessive burden to prove the veracity of the information provided. Relevant legal instruments of the Council of Europe and the Court’s case-law required a low standard of proof of the facts denounced by whistle-blowers, the aim of which was to encourage the revelation of facts of general interest and an inquiry by the State into those facts. In their view, instead of placing the burden on the whistle-blowers to prove the veracity of the facts reported, it was necessary to enable the State to inquire into the facts reported. In this connection they submitted that whistle-blowing was a mechanism for the advancement of democratic accountability designed to encourage the receipt and processing of reports by the persons best placed to resolve the problem concerned.

63.  The standard of proof required in cases of public disclosure of information by whistle-blowers was no more than a “sufficient factual basis”, the latter being assessed in the light of the whistle-blower’s personal experience. In cases where information was reported to the competent authorities, the damage caused to persons or institutions by potentially defamatory allegations was less severe than in the case of public disclosure, in view of the more restricted circle of addressees. The more limited effect of such reporting was a ground for a more indulgent requirement of moderation of expression. Affording a lower level of protection to citizens who reported information to the authorities would have a chilling effect on the freedom of expression and would encourage the leaking of information to the public to the detriment of reporting to the competent authorities.

64.  The third-party interveners further submitted that the obligation of the authorities to investigate the information divulged was the corollary of the principle of the indivisibility of human rights and the positive obligations placed upon the States. Only an inquiry by the authorities into the veracity of the allegations revealed by whistle-blowers could bring to light all aspects of the issue, to which the whistle-blower generally had only partial access.

65.  Lastly, the third-party interveners underlined that the damage to the reputation of public officials resulting from public disclosures was more severe than was the case when information was reported to the competent authorities. Accordingly, the Court should be more attentive when assessing the proportionality of penalties imposed upon whistle‑blowers who confined themselves to reporting information in private correspondence to the competent authorities.

B.  The Court’s assessment

1.  Existence of an interference

66.  The Court considers that the impugned decision of the BD Court of Appeal holding the applicants liable for defamation and ordering them to retract the letter, failing which they would have to pay non-pecuniary damages to M.S., constituted an interference with their right to freedom of expression under the first paragraph of Article 10 of the Convention.

67.  Such interference, in order to be permissible under the second paragraph of Article 10, must be “prescribed by law”, pursue one or more legitimate aims and be “necessary in a democratic society” for the pursuit of such aim or aims.

2.  Whether the interference was prescribed by law

68.  The expression “prescribed by law” in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V, and *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I).

69.  It was not disputed between the parties that the interference with the applicant’s right to freedom of expression had a legal basis in the domestic law – section 6 of the Defamation Act 2003 (see paragraph 41 above) – and that the relevant law was accessible. However, in their oral pleadings before the Grand Chamber the applicants argued that the application of section 6 of the Defamation Act to their case had not been sufficiently foreseeable for the purposes of Article 10 § 2 of the Convention.

70.  In this regard the Court reiterates that a norm cannot be regarded as a “law” within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he or she must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice (see *Karácsony and Others v. Hungary* [GC], no. 42461/13, § 124, ECHR 2016 (extracts), and *Delfi AS v. Estonia* [GC], no. 64569/09, § 121, ECHR 2015).

71.  Turning to the present case, the Court sees no need to pronounce itself on the belatedness of the applicants’ submission disputing the foreseeability of the relevant national law, as it is in any event unsubstantiated for the following reasons. It observes that the applicants presented no legal arguments, based on the terms of the national legal provisions or on national case-law, to indicate that their case fell outside the scope of application of the general rule in section 6(1) of the Defamation Act 2003 governing the circumstances in which a person could be held liable for defamation (see paragraph 41 above). In its judgment of 11 July 2007, the BD Court of Appeal found that the impugned four statements contained in the applicants’ letter (see paragraph 11 above) constituted an expression or dissemination giving rise to an actionable claim in defamation (see paragraph 21 above). The Constitutional Court of Bosnia and Herzegovina also accepted that section 6 of the Defamation Act 2003 applied to the applicants’ private correspondence with the BD authorities (see paragraph 33 above). They accepted accordingly that dissemination did not necessarily entail diffusion through media. While it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among other authorities, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 140, ECHR 2012; *Korbely v. Hungary* [GC], no. 9174/02, §§ 72-73, ECHR 2008; and *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999‑I), the Court finds nothing to suggest that the applicants were not in a position to foresee, to a reasonable degree, the national appellate court’s interpretation and application of section 6 of the Defamation Act 2003 to their case.

72.  Against this background, the Court is satisfied that section 6 of the Defamation Act 2003 met the required level of precision and that, accordingly, the interference was “prescribed by law”.

3.  Whether the interference pursued a legitimate aim

73.  There was no dispute between the parties that the interference complained of pursued a legitimate aim, namely “the protection of the reputation or rights of others”. The Court finds no reason to reach a different conclusion on this issue.

4.  Necessary in a democratic society

74.  It remains to be determined whether the interference complained of was “necessary in a democratic society”, which is the central issue in this case. In doing so, the Court has to examine whether the national courts struck a fair balance between the applicants’ right to freedom of expression guaranteed under Article 10 of the Convention and M.S.’s interest in the protection of her reputation.

(a)  General principles

i.  On the application of the requirement in Article 10 § 2 of the Convention that an interference be “necessary in a democratic society”

75.  The general principles for assessing the necessity of an interference with the exercise of freedom of expression were recently summarised in *Bédat v. Switzerland* [GC] (no. 56925/08, § 48, ECHR 2016) as follows:

“(i)  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, 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 ...

(ii)  The adjective ‘necessary’, within the meaning of Article 10 § 2, implies the existence of 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 European supervision, embracing both the legislation and the decisions applying it, even those given 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.

(iii)  The Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; 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 ...”

ii.  Protection of reputation under Article 8 of the Convention

76.  Furthermore, it may be reiterated that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life. The concept of “private life” is a broad term not susceptible to exhaustive definition, which covers also the physical and psychological integrity of a person. In order for Article 8 to come into play, however, an attack on a person’s reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012, and *A. v. Norway*, no. 28070/06, § 64, 9 April 2009). On the other hand, Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one’s own actions, such as, for example, the commission of a criminal offence (see *Axel Springer*,cited above, § 83 and *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 49, ECHR 2004‑VIII).

iii.  On the balancing of Article 10 and Article 8 of the Convention

77.  In instances where, in accordance with the criteria set out above, the interests of the “protection of the reputation or rights of others” bring Article 8 into play, the Court may be required to verify whether the domestic authorities struck a fair balance when protecting the two values guaranteed by the Convention, 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. The general principles applicable to the balancing of these rights were first set out in *Von Hannover v. Germany* (no. 2) [GC] (nos. 40660/08 and 60641/08, §§ 104-07, ECHR 2012) and *Axel Springer AG* (cited above, §§ 85-88), then restated in more detail in *Couderc and Hachette Filipacchi Associés* *v. France* [GC] (no. 40454/07, §§ 90-93, ECHR 2015 (extracts)) and more recently summarised in *Perinçek v. Switzerland* [GC] (no. 27510/08, § 198, ECHR 2015 (extracts)) as follows:

“(i)  In such cases, the outcome should not vary depending on whether the application was brought under Article 8 by the person who was the subject of the statement or under Article 10 by the person who has made it, because in principle the rights under these Articles deserve equal respect.

(ii)  The choice of the means to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the High Contracting Party’s margin of appreciation, whether the obligations on it are positive or negative. There are different ways of ensuring respect for private life and the nature of the obligation will depend on the particular aspect of private life that is at issue.

(iii)  Likewise, under Article 10 of the Convention, the High Contracting Parties have a margin of appreciation in assessing whether and to what extent an interference with the right to freedom of expression is necessary.

(iv)  The margin of appreciation, however, goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by independent courts. In exercising its supervisory function, the Court does not have to take the place of the national courts but to review, in the light of the case as a whole, whether their decisions were compatible with the provisions of the Convention relied on.

(v)  If the balancing exercise has been carried out by the national authorities in conformity with the criteria laid down in the Court’s case-law, the Court would require strong reasons to substitute its view for theirs.”

(b)  Approach to be adopted by the Court in the present case

78.  In order to determine the approach to be applied in the present case, the Court has to look at the interference complained of in the light of the case as a whole, including the form in which the remarks held against the applicants were conveyed, their content and the context in which the impugned statements were made (see *Stankiewicz and Others v. Poland*, no. 48723/07, § 61, 14 October 2014, and *Nikula v. Finland*, no. 31611/96, §§ 44 and 46, ECHR 2002‑II).

i.  Whether the Article 10 right is to be balanced against the Article 8 right

79.  The Court notes that it has not been submitted, nor does it appear, that the accusations made against M.S. in the applicants’ letter concerned conduct that was regarded as criminal under domestic law (see, conversely, *White v. Sweden*, no. 42435/02, § 25, 19 September 2006; *Sanchez Cardenas v. Norway*, no. 12148/03, §§ 37-39, 4 October 2007; *Pfeifer v. Austria*, no. 12556/03, §§ 47-48, 15 November 2007; and *A. v. Norway*, cited above, § 73). However, it finds that accusing M.S. of being disrespectful in regard to another ethnicity and religion was not only capable of tarnishing her reputation, but also of causing her prejudice in both her professional and social environment (see paragraph 104 below). Accordingly, the accusations attained the requisite level of seriousness as could harm M.S.’s rights under Article 8 of the Convention (see, *mutatis mutandis*, Dorota Kania v. Poland (no. 2), no. 44436/13, § 73, 4 October 2016, which concerned accusations made against a university rector that he had been a secret collaborator with the communist-era security services). The Court therefore must verify whether the domestic authorities struck a fair balance between the two values guaranteed by the Convention, namely, on the one hand, the applicants’ freedom of expression protected by Article 10 and, on the other, M.S.’s right to respect for her reputation under Article 8 (see *Axel Springer AG* [GC], cited above, § 84).

ii.  Relevance of the Court’s case-law regarding whistle-blowing

80.  The Court has further considered whether the applicants’ reporting could be qualified, as argued by the third-party interveners, as whistle-blowing, as this phenomenon has been defined in its case-law. However, the Court notes that the applicants were not in any subordinated work-based relationship with the BD public radio (see paragraphs 43 and 44 above) which would make them bound by a duty of loyalty, reserve and discretion towards the radio, which are particular features of this concept as defined in its case-law (see, by contrast, *Guja v. Moldova* [GC], no. 14277/04, § 70, ECHR 2008; *Bucur and Toma v. Romania*, no. 40238/02, § 93, 8 January 2013; and *Heinisch v. Germany*, no. 28274/08, § 64, ECHR 2011 (extracts)). The applicants, who werenot employees of the BD radio station, had no exclusive access to and direct knowledge of that information (see *Aurelian Oprea* *v. Romania*, no. 12138/08, § 59, 19 January 2016), but they apparently acted as “a vehicle for communication” (see paragraph 45 above) between the radio’s employees (regarding the alleged misconduct of M.S. in the workplace) and the BD authorities. No information has been submitted to the effectthat those employees suffered any repercussions as a consequence of their signalling of the alleged wrongdoing (ibid.). Neither did the applicants argue that their letter had to be regarded as whistle‑blowing (see, in contrast, *Guja*, cited above, § 60; *Heinisch,* cited above, § 43; and *Aurelian Oprea*, cited above, § 45). In the absence of any issue of loyalty, reserve and discretion, there is no need for the Court to enquire into the kind of issue which has been central in the above case-law on whistle-blowing, namely whether there existed any alternative channels or other effective means for the applicants of remedying the alleged wrongdoing (such as disclosure to the person’s superior or other competent authority or body) which the applicants intended to uncover (compare *Guja*, cited above, § 73).

iii.  Relevance of the Court’s case-law concerning the reporting on alleged irregularities in the conduct of State officials

81.  It is nonetheless significant that what prompted M.S. to bring the defamation proceedings was the contents of the applicants’ letter to the highest authorities in BD, in which they complained about M.S., who at the material time was an editor of the BD public radio’s entertainment programme and one of the candidates for the post of director of that radio station. Given that the radio was public and relied on State funding, it is not in doubt that she was to be regarded as a public servant. The Government maintained the same position (see paragraph 59 above).

82.  In this connection the Court finds particularly noteworthy the approach followed by the Constitutional Court of Bosnia and Herzegovina in the present case (see paragraph 33 above), relying in substance on Convention case-law developed in a comparable group of cases where the Court found on the facts that “the requirements of protection under Article 10 of the Convention ha[d] to be weighed not in relation to the interests of the freedom of the press or of open discussion of matters of public concern but rather against the applicants’ right to report alleged irregularities in the conduct of State officials” (see *Zakharov v. Russia*, no. 14881/03, § 23, 5 October 2006; Siryk v. Ukraine, no. 6428/07, § 42, 31 March 2011; *Sofranschi v. Moldova,* no. 34690/05, § 29, 21 December 2010; *Bezymyannyy v. Russia*, no. 10941/03, § 41, 8 April 2010; Kazakov v. Russia, no. 1758/02, § 28, 18 December 2008; and *Lešník v. Slovakia*,no. 35640/97, ECHR 2003‑IV). An important consideration in this line of case-law isthat “it is one of the precepts of the rule of law” that “citizens should be able to notify competent State officials about the conduct of civil servants which to them appears irregular or unlawful” (see *Zakharov*, § 26; *Siryk*, § 42; *Sofranschi*, § 30; *Bezymyannyy*, § 40; *Kazakov*, § 28; and *mutatis mutandis*, *Lešník*, § 60; all cited above). Both the foregoing principle and the judgments applying it show that the Court has been prepared to assess an applicant’s good faith and efforts to ascertain the truth according to a more subjective and lenient approach than in other types of cases(see*Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 87, ECHR 2004‑XI).

83.  At the same time it should be emphasised that in the above‑mentioned rulings a crucial factor in the Court’s proportionality assessment was the fact that the impugned defamatory statements had been made by way of private correspondence addressed by the applicant to the hierarchical superior of the aggrieved party concerned (compare *Siryk*, cited above, § 42; *Bezymyannyy*, cited above, § 41; *Kazakov*, cited above, § 28; *Zakharov*, cited above, § 23; and *Lešník*, cited above) or to State officials (compare *Sofranschi,* cited above, § 29). In some of these cases, the disputed allegations had resulted from the applicants’ direct personal experience (*Siryk* concerned allegations by the applicant that officials of the Tax Service Academy, where her son had studied, had demanded a bribe from her; in *Bezymyannyy* the applicant had reported the alleged unlawful conduct of a judge who had adjudicated his case; in *Kazakov* a former army officer had sent a letter of complaint alleging unlawful conduct on the part of a military unit commander; in *Lešník* the applicant had complained of abuse of office and corruption regarding a public prosecutor who had rejected his criminal complaint against a third person), while in others they had been submitted by applicants who had not been directly involved in the matters complained of (*Zakharov* concerned a complaint by an individual that a town official had abused her office and had facilitated land usurpation; in *Sofranschi* the applicant, who was a member of the electoral staff of a candidate for the position of mayor of their village, had written a letter criticising another candidate).

84.  Thus, as can be seen from the foregoing analysis, there are a number of similarities between the *Zakharov*-type cases and the present one. However, as will be explained below, there are also certain distinctive features, which militate in favour of adopting a more nuanced approach based on further criteria.

iv.  Relevance of the Court’s case-law concerning defamation of public officials and the role of NGOs and the press

85.  In particular, unlike in the above-cited cases, the allegations which the applicants had laid before the authorities in the present case had not been made by a private individual but by four NGOs and had not been based on direct personal experience.

86.  From the outset, it should be underlined that the role of an NGO reporting on alleged misconduct or irregularities by public officials is no less important than that performed by an individual according to the *Zakharov* line of authority, even where, as in the present instance, it is not based on direct personal experience. Indeed, the Court has accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, ECHR 2013 (extracts)) and may be characterised as a social “watchdog” warranting similar protection under the Convention as that afforded to the press (ibid., and *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 166, 8 November 2016). It has recognised that civil society makes an important contribution to the discussion of public affairs (see, for instance, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 89, ECHR 2005‑II, and *Magyar Helsinki Bizottság*, cited above, § 166). It is also noteworthy that the Fundamental Principles on the Status of Non-Governmental Organisations cited at paragraph 45 above underline the important contribution of NGOs “to the development, realisation and continued survival of democratic societies” and the need for such societies to “encourage [NGOs] to participate in ... mechanisms for dialogue, consultation and exchange”.

87.  At the same time it should not be overlooked that, in a comparable way to the press, an NGO performing a public watchdog role is likely to have greater impact when reporting on irregularities of public officials, and will often dispose of greater means of verifying and corroborating the veracity of criticism than would be the case of an individual reporting on what he or she has observed personally. In the area of press freedom the Court has held that “by reason of the ‘duties and responsibilities’ inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the *proviso* that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism” (see *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports of Judgments and Decisions* 1996‑II; *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999‑I; and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999‑III). Recently, in the above-cited case of *Magyar Helsinki Bizottság*, the Court affirmed that the same considerations would apply to an NGO assuming a social watchdog function (§ 159). A similar view is reflected in the Code of Ethics and Conduct for NGOs cited at paragraph 46 above, according to which “an NGO should not violate any person’s fundamental human rights”, “should give out accurate information ... regarding any individual” and“the information that [an NGO] chooses to disseminate to ... policy makers ... must be accurate and presented with proper context”.

v.  Conclusion

88.  Accordingly, the present case reveals a need to have regard to a broader range of factors than in the *Zakharov*-type cases, in which the Court attributed “crucial importance” to the fact that applicants addressed their complaints by way of private correspondence (see *Zakharov*, § 26; *Sofranschi*, § 33; and *Kazakov*, § 29, all cited above, and *Raichinov v. Bulgaria*, no. 47579/99, § 48, 20 April 2006) and accepted a relatively lenient burden on the applicant to ascertain their veracity (see paragraph 82 above). In balancing the competing interests involved, namely the applicants’ right to freedom of expression against M.S.’s right to respect for her private life (see paragraph 79 above), the Court finds it appropriate to take account also of the criteria that generally apply to the dissemination of defamatory statements by the media in the exercise of its public watchdog function, namely the degree of notoriety of the person affected; the subject of the news report; the content, form and consequences of the publication; as well as the way in which the information was obtained and its veracity, and the gravity of the penalty imposed (see *Von Hannover*, cited above, §§ 108-13, ECHR 2012; *Axel Springer AG*, cited above, §§ 89-95; and *Couderc and Hachette Filipacchi Associés*, cited above, § 93).

(c)  Application of the above principles and criteria in the present case

89.  The Court will examine the factors relevant to the present case in turn in order to determine whether the interference, seen as a whole, was supported by relevant and sufficient reasons and was proportionate to the legitimate aim pursued.

i.  Private nature of the correspondence

90.  The Court notes that the domestic courts’ examination was confined to the private correspondence between the applicants and the State officials. Indeed, the Court of Appeal’s finding that the applicants were liable for defamation was based only on “the letter sent to the Office of High Representative BD - International Supervisor of the BD, the President of the BD’s Assembly and the Governor of the BD ... [in which they] expressed and disseminated to the above persons facts about the plaintiff’s behaviour, actions and statements ...” (see paragraph 28 above). The Constitutional Court confirmed that the “impugned [court] decisions concern[ed] the letter which the [applicants] sent to the authorities of the BD and the Supervisor for BD casting the plaintiff (M.S.) in a negative light” (see paragraph 33 above). The fact that the applicants’ letter was published in local newspapers played no role in the domestic courts’ finding regarding the applicants’ liability for defamation, as it was not proven that they had been responsible for its publication. That was confirmed by the Government in their memorials (see paragraph 60 above).

91.  The Court is also of the opinion that the applicants’ liability for defamation should be assessed only in relation to their private correspondence with local authorities, rather than the publication of the letter in the media (see *Bezymyannyy*, cited above, § 37) or any other means (see *Sofranschi*, cited above, § 28, which concerned spreading the impugned rumours among villagers).

ii.  Public interest involved in the information contained in the letter

92.  A relevant factor to be taken into consideration is whether the information contained in the applicants’ letter concerned an issue of public interest. This depends on a broader assessment of the subject matter and the context of the letter (see *Bladet Tromsø and Stensaas*, cited above, § 63; *Björk Eiðsdóttir v. Iceland*, no. 46443/09, § 67, 10 July 2012, and *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04, § 87, 1 March 2007).

93.  The Court notes that in the letter the applicants were critical of the extent to which the national authorities complied with the principle of proportional representation of ethnic communities in the BD’s public service (see paragraph 10 above). They referred to previous cases of non-compliance with that principle, which allegedly had been to the disadvantage of Croats and Bosniacs in the BD. Those cases also involved employment of staff in the BD radio station. In this connection they challenged the candidature of M.S. for the post of the radio’s director allegedly submitted by the majority members of the selection panel, who had been Serbs. They alleged that she had been involved in disparaging behaviour towards ethnic Bosniacs.

94.  The Court considers that there can be no doubt that any discussion concerning the ethnic balance of employees in the public service was important and fell within the public domain. A high standard of public service in which civil servants, in particular those who were “generally perceived as having an important influence on public issues of political interest” (see paragraph 22 above), were respectful of the ethnic and religious identity of those living in Bosnia and Herzegovina was an important issue of public concern. The particular importance that any ethnic- or religious-related issue had at the relevant time in Bosnian society, as argued by the Government, was further evidence that the letter, seen as a whole, concerned matters of public concern in the BD. These issues were at least of considerable concern for the Bosniacs, represented by the applicants, who, as transpired from the letter, considered themselves under-represented in the public service (see *Albert-Engelmann-Gesellschaft mbH v. Austria*, no. 46389/99, § 30, 19 January 2006).

iii.  Recipients of the letter competent to receive the information

95.  The Court notes that the authorities contacted by the applicants did not have direct competence in the proceedings for the appointment of the radio’s director (see paragraph 35 above). However, it accepts that they had a legitimate interest in being informed about the matters raised in the letter. The Government did not submit otherwise.

iv.  The manner in which the applicants reported the alleged irregularities to the relevant authorities

96.  The Court will focus its examination on the applicants’ allegations against M.S., which were the sole basis on which the domestic courts relied in finding the applicants liable for defamation (see paragraph 23 above and § 33 of the Chamber judgment). The relevant statements read as follows:

“According to our information (*našim informacijama*) the lady in question

(1)  stated in an interview published in ‘NIN’, commenting on the destruction of mosques in Brčko, that Muslims were not a people, that they did not possess culture and that, accordingly, destroying mosques could not be seen as destruction of cultural monuments,

(2)  as an employee of the BD radio demonstratively tore to pieces (*demonstrativno kidala*) on the radio’s premises the calendar showing the schedule of religious services during the month of Ramadan,

(3)  on the radio’s premises covered the coat of arms of Bosnia and Herzegovina with the coat of arms of the Republika Srpska,

(4)  as an editor of the cultural programme on BD radio banned the broadcasting of *sevdalinka* arguing that that type of song had no cultural or musical value.”

97.  The domestic courts (both the BD Court of Appeal and the Constitutional Court of Bosnia and Herzegovina) qualified these allegations as statements of fact (and not as value judgments). Noting that the impugned statements essentially described words and deeds allegedly imputed to M.S., the Court does not see any grounds to find otherwise.

α)  How well known was the person concerned and what was the subject of the allegations

98.  It is to be noted that the above allegations concerned M.S., who, at the time, was an employee of the BD radio station and, accordingly, a public servant (see paragraph 81 above). The Court reiterates that civil servants acting in an official capacity are subject to wider limits of acceptable criticism than ordinary individuals (see *Morice v. France* [GC], no. 29369/10, § 131, ECHR 2015). Given the nature of the post which M.S. held at the relevant time (an editor of the entertainment programme), it cannot be said that those limits were as wide as in the case of politicians (see *Pedersen and Baadsgaard*, cited above, § 80; *Thoma v. Luxembourg*, no. 38432/97, § 47, ECHR 2001‑III; and *Janowski*, cited above, § 33). However, the Court notes that M.S., by having applied for the post of the radio’s director and bearing in mind also the public interest involved in the information contained in the letter (see paragraph 94 above), must be considered to have inevitably and knowingly entered the public domain and laid herself open to close scrutiny of her acts. The BD Court of Appeal also accepted that M.S. was a civil servant and that the post of the radio’s director was to be regarded as being of a particular public concern (see paragraph 22 above). In such circumstances, the Court considers that the limits of acceptable criticism must accordingly be wider than in the case of an ordinary professional (see, *mutatis mutandis*, *Björk Eiðsdóttir*, cited above, § 68, and *Erla Hlynsdόttir v. Iceland*, no. 43380/10, § 65, 10 July 2012).

99.  As noted above (see paragraph 96 above), the impugned four statements contained allegations of wrongdoing on the part of M.S. in the workplace and a comment in a newspaper, of which she allegedly was the author, and which showed contempt for different ethnic and religious segments of Bosnian society.

β)  Content, form and consequences of the information passed on to the authorities

100.  For the assessment under this head, an important factor is the wording used by the applicants in the impugned letter. In this connection the Court notes that the applicants did not explicitly say in the letter that part of the information which they passed on to the authorities had emanated from other sources (employees of the radio station) (see *Thoma*, cited above, § 64, and *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 65, Series A no. 239), without there being any obligation to identify that source (see *Albert-Engelmann-Gesellschaft mbH,* cited above, § 32). The applicants had introduced their letter with the words “according to our information”, but had not clearly indicated that they had acted as messengers. Therefore they implicitly presented themselves as having direct access to that information (see *Verdens Gang and Aase v. Norway* (dec.), no. 45710/99, ECHR 2001‑X; compare *Thoma*, cited above, § 64). In these circumstances, they assumed responsibility for the statements included in their letter.

101.  Similar considerations apply to the allegation that in her office M.S. had covered the State coat of arms of Bosnia and Herzegovina with the coat of arms of Republika Srpska, which, as established in the defamation proceedings, was based on a rumour (see paragraph 25 above) (see *Tønsbergs Blad A.S. and Haukom*, cited above, § 95). The Court will revert to this issue later in its analysis of the applicants’ duty of care to verify the veracity of the impugned information.

102.  Another important factor is whether the thrust of the impugned statements was primarily to accuse M.S. or rather to notify the competent State officials of conduct which to them appeared irregular or unlawful (see *Zakharov*, cited above, § 26). In its contextual examination of the disputed letter as a whole, the Court must carry out its own evaluation of the impugned statements (see *Nikowitz and Verlagsgruppe News GmbH v. Austria*, no. 5266/03, §§ 25-26, 22 February 2007).

103.  The applicants maintained that their intention had been to inform the competent authorities about certain irregularities and to prompt them to investigate and verify the allegations made in the letter (see paragraphs 17 and 53 above). The Court notes, however, that the impugned letter did not contain any “request” for investigation and verification of the allegations. Whilst the applicants expressed their expectation that the authorities “would react appropriately to [their] letter” (see paragraph 11 above), it is uncertain whether that expression concerned investigation or verification of the factual allegations about M.S. In any event, the Court cannot but note the applicants’ statement in the letter that “a Bosniac should be appointed to that [radio’s director] position” (see paragraph 11 above).

104.  As to the consequences of the above accusations passed on to the authorities, the Court considers that there can be little doubt that when considered cumulatively and against the background of the specific context in which they were made (see paragraph 59 above), the conduct attributed to M.S. was to be regarded as particularly improper from a moral and social point of view. The allegations cast M.S. in a very negative light and were liable to portray her as a person who was disrespectful and contemptuous in her opinions and sentiments about Muslims and ethnic Bosniacs. The domestic courts held that the statements in question contained defamatory accusations that damaged M.S.’s reputation (see paragraph 28 above). The Court sees no reason to hold otherwise. On the contrary, the nature of the accusations was such as to seriously call into question M.S. suitability not only for the post of director of the BD radio for which she had applied, but also for her role as editor of the BD’s radio entertainment programme in a multi-ethnic public radio station.

105.  That these allegations were submitted to a limited number of State officials by way of private correspondence did not eliminate their potential harmful effect on the career prospects of M.S. as a civil servant and her professional reputation as a journalist. The Government argued that the impugned letter had served “as a means of political pressure” that had prevented the selection panel from appointing either of the candidates for the post. Without drawing any inferences as to whether the impugned statements in the letter played any role in the selection procedure that was ongoing at the time, the Court observes that M.S. was not appointed to the post of director of the BD radio.

106.  Lastly, the Court notes that the applicants’ defamatory accusations about M.S. had been leaked to the press. Any conclusion as to how the impugned letter in the present case reached the media would veer precariously close to speculation. Irrespective of how the letter reached the media, it is conceivable that its publication opened a possibility for public debate and aggravated the harm to M.S.’s dignity and professional reputation.

γ)  The authenticity of the information disclosed

107.  Another, and in the Court’s view, the most important factor relevant for the balancing exercise in the present case is the authenticity of the information passed on to the authorities.

108.  The Court refers to its finding that the activities of the applicants, who were playing the role of social watchdogs, warrant similar Convention protection to that afforded to the press (see paragraph 87 above). In the context of press freedom, the Court has held that special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations (see, among other authorities, *Bladet Tromsø and Stensaas*, § 66; *Pedersen and Baadsgaard*, § 78, and *Björk Eiðsdóttir*, § 70, all cited above). These factors, in turn, require consideration of other elements such as whether the newspaper had conducted a reasonable amount of research before publication (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 37, Series A no. 313), whether the newspaper presented the story in a reasonably balanced manner (see *Bergens Tidende and Others v. Norway*, no. 26132/95, § 57, ECHR 2000‑IV) and whether the newspaper gave the persons defamed the opportunity to defend themselves (ibid., § 58).

109.  Similarly to newspapers, the Court considers that the applicants in the present case were bound by the requirement to verify the veracity of the allegations submitted against M.S. This requirement is inherent in the Code of Ethics and Conduct for NGOs (see paragraphs 46 and 86 above) and it is to be seen in the context of the “responsibilities” in the operation of NGOs (see paragraph 45 above). That the impugned allegations were communicated to the State authorities by means of private correspondence, albeit an important consideration, did not confer wholly unrestricted freedom on the applicants to submit unverified aspersions. The duty of the authorities to verify such allegations cannot be regarded as a substitute for the ordinary obligation of verification of factual statements that are defamatory, even of public officials. That the applicants were perceived (see paragraph 16 above) – and, indeed, acted as representatives of the interests of particular segments of the population in the BD – increased their duty to verify the accuracy of the information before they reported it to the authorities. The Court will analyse whether the applicants complied with this obligation in respect of each of the impugned statements. The reasonableness of the efforts made in this respect must be determined in the light of the situation at the time of the preparation of the letter, rather than with the benefit of hindsight (see, *mutatis mutandis*, *Stankiewicz and Others*, cited above, § 72).

110.  The information which the applicants passed on to the authorities, given its source, was twofold: 1) information which the applicants received from employees of the radio station and 2) information obtained in another way.

111.  The information under 1) concerned allegations of fact regarding the removal of the calendar of religious services during the month of Ramadan from a wall in the radio’s premises and the alleged ban on broadcasting *sevdalinka*. The domestic courts established that R.S. and O.S. (both employees of the radio station) had discussed those two issues with O.H., the member and legal representative of the first applicant in the case. However, they held that the employees’ account was not accurately rendered in the applicants’ letter. Both R.S. and O.S. confirmed that M.S. had removed the Ramadan religious calendar from a wall in the radio’s premises. However, they did not confirm the part of the applicants’ statement that in doing so M.S. had “demonstratively tore [the calendar] to pieces”. Furthermore, O.S. confirmed that he had complained to the first applicant that M.S. had asked him to explain why *sevdalinka* had been broadcasted during the slot reserved in the programme for another type of music. However, there was nothing to show that O.S. had said that M.S. “banned the broadcasting of *sevdalinka* arguing that that type of song had no cultural or musical value”.

112.  The Constitutional Court of Bosnia and Herzegovina held that “there was an evident inconsistency between what had been said to the appellants and what they had reported in the letter ...” (see paragraph 33 above). Although a certain degree of hyperbole and exaggeration is to be tolerated, and even expected, concerning reporting by NGOs (see *Steel and Morris*, cited above, § 90), this discrepancy was not trivial, but loaded the account obtained from the employees thus aggravating the depiction of M.S. as disrespectful of the cultural and ethnic identity of Bosniacs and Muslims. The Court underlines that the applicants, as NGOs whose members enjoyed a good reputation in society (see paragraph 59 above), were required to present an accurate rendering of the employees’ account, as an important element for the development and maintaining of mutual trust and of their image as competent and responsible participants in public life. Furthermore, the disputed allegations were presented as statements of fact rather than as value judgments. The domestic courts held that that inconsistency was imputable to the applicants. The latter have not submitted any evidence that could cast doubt on that finding.

113.  The information under 2) above concerned the accusations that M.S. had covered the coat of arms of Bosnia and Herzegovina with the coat of arms of Republika Srpska and that in a local newspaper she had made a statement that “Muslims were not a people, that they did not possess culture and that, accordingly, destroying mosques could not be seen as destruction of cultural monuments.”

114.  As to the alleged “incident” regarding the coat of arms, the domestic courts established that it had been discussed at the meeting of the applicants held before the preparation of the letter. At that meeting S.C., the representative of the second applicant in the case, had confirmed that he had heard people speaking in the city about the alleged incident (see paragraph 25 above). The applicants did not produce, either in the defamation proceedings or in the proceedings before the Court, any evidence that they had made any effort to verify the veracity of that rumour before reporting it to the authorities. On the basis of oral evidence from three employees of the radio produced at the trial, the domestic courts established the inaccuracy of that information (see paragraph 27 above).

115.  Even more importantly, the applicants’ reporting of M.S. as the author of the impugned article in the newspaper was based on guess-work by “a distinguished member of [an applicant organisation] ...” (see paragraphs 25 and 26 above). Whereas a statement as reported by the applicants had indeed been given in the article in question, the domestic courts established that M.S. had not been the author. The Court considers that the verification of that fact prior to reporting would not have required any particular effort on the part of the applicants. The identity of the author of that statement was readily ascertainable and would have required simple research by the applicants. Despite the seriousness of their accusation against M.S., the applicants made this statement frivolously without making any attempt, prior to reporting, to verify the authenticity of their allegation. The Court stresses that the more serious the accusation, the higher diligence is required before bringing it to the attention of the relevant authorities (see *Pedersen and Baadsgaard*, cited above, §§ 80 and 87). The applicants also failed to inform the recipients of the letter about its inaccuracy after they had discovered that M.S. had not been the author of the impugned statement (see paragraph 26 above). They put forward no reason for failing to do so.

116.  In addition, and in the context of the particular circumstances of the case, the Court notes that M.S. was not given the opportunity to comment on the allegations which the applicants intended to bring to the attention of the State authorities (see *Bergens Tidende and Others*, cited above, § 58). No argument was submitted that such an effort would have been impossible or inappropriate in the circumstances of the case.

117.  The BD Court of Appeal held that the applicants “did not prove the truthfulness [of these statements] ... which they knew or ought to have known were false” (see paragraphs 27 and 28 above). The Constitutional Court further added that those statements concerned “manifestly untrue facts” and that the applicants “did not make reasonable efforts to verify the truthfulness of [those] statements of fact before [reporting], but merely made [those statements]” (see paragraph 33 above). The Court finds no reasons to depart from that finding. It concludes accordingly that the applicants did not have a sufficient factual basis for their impugned allegations about M.S. in their letter.

δ)  The severity of the sanction

118.  The last element to be taken into consideration is the severity of the sanction imposed on the applicants. In this connection the Court reiterates that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference (see *Sürek v. Turkey* *(no. 1)* [GC], no. 26682/95, § 64, ECHR 1999‑IV; *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999‑IV; *Chauvy and Others v. France*, no. 64915/01, § 78, ECHR 2004-VI; and *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001‑I).

119.  It notes that the BD Court of Appeal made two orders against the applicants: that they inform the authorities that they retracted their letter (retraction order), failing which they would have to pay EUR 1,280 jointly in respect of non-pecuniary damages (payment order), and that they give the judgment to the BD radio and television and to two newspapers for publication at the applicants’ own expense (publication order) (see paragraph 29 above). The Chamber “had regard to the award of damages made against the applicants in the context of a civil action and did not find it to be disproportionate” (see § 35 of the Chamber judgment).

120.  The Court does not consider that the order requiring the applicants to retract the letter within fifteen days or pay damages raises any issue under the Convention. It was only after expiration of the time-limit set by the BD Court of Appeal that the domestic courts began taking measures to enforce the payment order. The Court is further satisfied that the amount of damages which the applicants were ordered to pay was not, in itself, disproportionate. Accordingly, it is of no relevance that in determining this amount the BD Court of Appeal took into account the publication of the impugned letter in the media despite not having relied on that fact in finding the applicants liable for defamation (see paragraphs 29 and 60 above). Similar considerations apply to the publication order.

ε)  Conclusion

121.  In view of the foregoing, the Court discerns no strong reasons which would require it to substitute its view for that of the domestic courts and to set aside the balancing done by them (see *Von Hannover (no. 2)*, cited above, § 107, and *Perinçek*, cited above, § 198). It is satisfied that the disputed interference was supported by relevant and sufficient reasons and that the authorities of the respondent State struck a fair balance between the applicants’ interest in free speech, on the one hand, and M.S.’s interest in protection of her reputation on the other hand, thus acting within their margin of appreciation (see *Tammer,* cited above, § 60, and *Pedersen and Baadsgaard*, cited above, § 68).

122.  Accordingly, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

*Holds*, by eleven votes to six, that there has been no violation of Article 10 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 June 2017.

Søren Prebensen András Sajó  
 Deputy to the Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a)  Joint dissenting opinion of Judges Sajó, Karakaş, Motoc and Mits;

(b)  Dissenting opinion of Judge Vehabović;

(c)  Dissenting opinion of Judge Kūris.

A.S.  
S.C.P.

JOINT DISSENTING OPINION OF JUDGES SAJÓ,  
KARAKAŞ, MOTOC AND MITS

To our regret, we disagree with the majority and find that there has been a violation of Article 10 in the present case. This case cannot be decided on the basis of the general principles applicable in the area of freedom of the press and the applicants cannot be held responsible for publication of their letter by unknown persons.

The case needs to be framed properly: an NGO, having received a great deal of information from the employees of the Brčko district (BD) public radio, sent a letter addressed exclusively to the highest authorities of BD (the International Supervisor, the President of the Assembly and the Governor). In the letter they drew attention to the unsuitability of M.S., a candidate for the position of director of BD radio, to that position and asked the aforementioned authorities to take appropriate action. The result was that the NGO had to pay damages to M.S. and retract the letter sent to the authorities.

We agree that the case is a sensitive one (see the dissenting opinion of Judge Vehabović). We also agree that the applicants do not qualify as whistleblowers; nor is it necessary in this case to define who they are. However, at least with respect to the matters brought to their attention by the employees of BD public radio who came to discuss the behaviour of M.S. in the workplace (see paragraph 24 of the judgment), the NGO acted as a quasi-whistleblower. This is an important aspect of the case that must not be neglected.

Moreover, the Constitutional Court of Bosnia and Herzegovina followed the Court’s case-law relating to complaints against public officials, and the Grand Chamber also accepts that there are a number of similarities with that type of case (see paragraphs 82-84 of the judgment). Indeed, there are similarities: complaints were made (concerns were raised) in a private letter addressed to the relevant authorities about misconduct of a public official (candidate for a public post). The important consequence, as was stated in paragraph 23 of the judgment *Zakharov v. Russia*, is that requirements of the protection under Article 10 “have to be weighed not in relation to the interests of the freedom of the press or of open discussion of matters of public concern but rather against the applicant’s right to report irregularities in the conduct of State officials to a body competent to deal with such complaints”.

Acting as a quasi-whistleblower and reporting alleged misconduct to the aforementioned authorities in a private letter requires the application of a more subjective and lenient approach than in completely different factual situations (see paragraph 82 of the judgment).

Against this background we find it unjustified to assess the truthfulness of the statements contained in a private letter with the same rigour as if they were contained in an article published by the applicants in the press. In respect of the three statements (the calendar, the coat of arms and *sevdalinka*), in so far as can be ascertained from the case materials, the existence of a factual basis was confirmed either by M.S. herself (see paragraph 15 of the judgment) or the domestic court (see paragraphs 24 and 26 of the judgment). It is true that the statement in *NIN*, a newspaper published in Serbia that was not available at the time in Bosnia and Herzegovina, although it did turn out to exist, had in fact been made by a person other than M.S. Even so, this fact cannot be assessed in isolation and disregarding the context in which it was presented.

The words in the letter “according to our information” and “we hope that you will act appropriately” indicated that the applicants were not the authors of this information and that the authorities should have verified it instead of holding the applicants liable. We disagree that the applicants alone, an NGO alerting the authorities, had an obligation to verify the veracity of the information (see paragraph 109 of the judgment). The obligation to verify information rests with any authority receiving such an allegation; moreover, this was implied in the text of the letter. Against this background, we conclude that the four impugned statements had a factual basis that was sufficient in the context of the case.

The majority found particularly important, and applied, the principles developed in the area of freedom of the press, namely, whether the newspaper had conducted a reasonable amount of research before publication; whether it had presented the story in a reasonably balanced manner; and whether it had given the persons defamed the opportunity to defend themselves (see paragraph 108 of the judgment). As stated in the *Zakharov* judgment cited above, these principles are not applicable in the present case since they disregard and distort the factual framework of the case. This is illustrated, for example, by the inappropriateness of the requirement to provide M.S. with an opportunity to comment on a private letter (see paragraph 116 of the judgment) and the obligation to retract the letter (see paragraph 119 of the judgment) whose aim was to bring to the attention of the relevant authorities the unsuitability of M.S. for the relevant position on a BD public radio and to request them to take appropriate action.

It is important to note that the applicants cannot be held responsible for the fact that the letter was published in three newspapers and thus made public. There is no evidence in the case materials that the applicants were responsible for publication. While the majority acknowledge this fact, they nevertheless conclude that the publication opened a possibility for public debate and thus aggravated the harm done to the dignity and professional reputation of M.S. (see paragraph 106 of the judgment). This conclusion implicitly contributes to a ruling against the applicants.

To conclude, we consider that the majority have gone down a path that is not supported by the facts of the case. There is a strong element in this case relating to the right of citizens to inform public authorities about irregularities by public officials (or officials to be) which is linked to the concept of the rule of law and it should have been decided that way. Accordingly, we conclude that the reasons adduced by the domestic courts were not “relevant and sufficient” (see, for example, *Sofranschi* *v. Moldova*, no. 34690/05, § 34, 21 December 2010) to justify the interference with the applicants’ freedom of expression.

DISSENTING OPINION OF JUDGE VEHABOVIĆ

I regret that I am unable to subscribe to the view of the majority that the Court of Appeal’s judgment finding the applicants liable for defamation, as upheld by the Constitutional Court, was compatible with Article 10 of the Convention. I am of the opinion that it was not and that there has therefore been a violation of the applicants’ right under that Article to hold opinions and to receive and impart information and ideas.

“On 1 May 1992 *radio broadcasts* ordered the Muslim and Croat inhabitants of Brčko to surrender their arms. Serbian forces comprised of soldiers and paramilitary and police forces were deployed within the town. The Serbian offensive targeted the non-Serbian population of Brčko. Neighbourhood by neighbourhood, the inhabitants were directed to collection centres where the Serbs were separated from the Muslims and Croats”. That excerpt from the judgment of the International Criminal Tribunal for the former Yugoslavia (“the ICTY”) against Goran Jelisi, nicknamed “Adolf” (see *Prosecutor v. Goran Jelisi*, IT-95-10-T, 14 December 1999), sheds light on the very first day of military occupation of Brčko as described by the ICTY. Public radio broadcasts played a small but crucial role in the very early days of the war in Bosnia and Herzegovina.

Eight years after the end of the terrible events in Brčko the applicants wrote a letter to the highest authorities of Brčko District (BD), namely the International Supervisor for BD, the President of the Assembly of BD and the Governor of BD, while the procedure for the appointment of a director of the BD’s multi-ethnic public radio station was still pending. In the letter they voiced their concerns regarding the procedure for the appointment of a director of that public radio station. They criticised the authorities for having disregarded the principle of proportional representation of ethnic communities in the public service of BD set out in the Statute of BD. That Statute is BD’s highest Act. Article 20(1) provides that “public employment with the District ... shall reflect the composition of the population.”

Shortly thereafter the letter was published in three different daily newspapers.

Immediately upon submission of the letter to the three authorities (apparently before publication of the letter in the media – see paragraph 15 of the judgment[[9]](#footnote-9)), M.S. (a candidate for the post of director mentioned in the letter) initiated civil defamation proceedings against the applicants. The Court of First Instance dismissed the claim and concluded that the applicants could not be liable for the alleged defamation because they had not published the letter in the media. The Court of Appeal quashed that judgment, however, and decided that the applicants were liable for defamation. Its judgment was upheld by the Constitutional Court of Bosnia and Herzegovina.

I disagree with the majority’s conclusion finding no violation of Article 10 of the Convention for the following reasons:

1.  The letter written by the applicants was addressed to the highest authorities of BD as a confidential letter with a special instruction that only the persons to whom the letter was addressed were authorised to open and read it (*na ruke*).

That letter should be considered as confidential correspondence between the applicants and the authorities (represented by the persons to whom the letter was addressed) competent to deal with its contents. All subsequent events, such as publication of the letter and its contents, were not in any way related to the applicants.

2.  Dissemination of the letter cannot be attributed to the applicants.

I am fully aware that even when reporting certain issues, such as misconduct of civil servants, or reporting criminal offences, an applicant may in certain circumstances be liable for words written, but a distinction should be drawn between a clear intention to falsely report someone or a criminal act and efforts to provide the competent authorities with additional information in order to deal with such allegations.

In many countries there are public campaigns to report cases of corruption. Many reports are based on untrue facts or inappropriate value judgements but these reports cannot be likened to a letter that, if revealed to the media, could render the senders of the letter liable for defamation. A clear line must be drawn between confidential or private communication and dissemination of information. My opinion is that the sender of a confidential (or even private) missive cannot be held liable in defamation if that missive is disclosed by a third party to the media without any involvement on the part of the sender, even if it contains completely untrue facts.

In my view, in situations such as the present one defamation proceedings can only be brought if the applicant disseminates and discloses to the general public contents of a private letter (see *Gąsior v. Poland*, no. 34472/07, 21 February 2012*,* in which the applicant sent a private letter to Polish Television and it was clear that the TV station was not a body competent to collect and process further information in order to investigate the applicant’s allegation).

Dissemination of information is an important part of Article 10 of the Convention. In this case, my understanding of Article 10, paragraph 2, and in particular the wording “protection of the reputation or rights of others, for preventing the disclosure of information received in confidence” is that confidential communication between citizens and different public bodies competent to deal with various kinds of complaints cannot be the subject of any penalties or limitations except where that communication is disclosed to the public. Then the confidential content of communication automatically becomes public and subject to the restrictions prescribed in Article 10. In the present case the only persons responsible are those who disseminated the false information. They should be liable for defamation and not the applicants.

On this particular issue the Court of First Instance made the following observation:

“It is clear that the defendants’ letter was addressed personally to the Governor, to the President of the Assembly and to the Supervisor for BD... and it was not sent to the media ... the aim of the letter was to bring the attention of the authorities to (these) issues and to enable them to draw certain conclusions on verification of that information, and not to publish unverified information”

Having examined the articles published in the media, the court concludes that “*none of them was published by the [defendants] in this case*” (see paragraph 18 of the judgment).

The Court of Appeal quashed the judgment and concluded that it was “irrelevant that *the applicants did not publish the letter*...”

The Constitutional Court accepted the facts as established by the lower court on the question of dissemination of the letter.

3.  The letter was submitted to the authorities responsible for completing the procedure to appoint the director of the local public radio station. The BD authorities are the only bodies with power to deal with allegations and if necessary to take further steps to conduct an internal investigation in order to provide a transparent procedure for selection of the best candidates for the position in question, which is of particular importance in a multi-ethnic society such as BD.

I consider that, in the circumstances of the present case, the fact that the applicants addressed their complaint by way of a confidential letter to the State officials competent to examine the matter is of crucial importance to the Court’s assessment of the proportionality of the interference (compare *Janowski v. Poland* [GC], no. 25716/94, § 34, ECHR 1999‑I, and *Raichinov v. Bulgaria*, no. 47579/99, § 48, 20 April 2006). The general aim of the applicants’ letter was to bring to the attention of the authorities certain irregularities in a selection process to appoint the director of a multi-ethnic public radio station. To conclude, I consider that the statements in the letter concerned a matter of public interest for the local community.

In paragraph 100 of the judgment the majority conclude that “[f]or the assessment under this head, an important factor is the wording used by the applicants in the impugned letter. In this connection the Court notes that the applicants did not explicitly say in the letter that part of the information which they passed on to the authorities had emanated from other sources”. This is not correct.

The applicants never claimed that the information contained in the letter was true, but invited the competent authorities to investigate the allegation submitted in it. In that letter, in which they expressed their concerns and provided some factual statements about one of the candidates for the post of director of BD’s public radio station, the applicants gave an explicit warning that the information contained in the letter had not been verified, using the terms “unofficial information” and “according to our information” but their main objective was not, as I understand the contents of the letter, to insult Ms M.S. but to draw attention to the fact that Bosniacs and Croats were under-represented in the selection process contrary to the obligation set out in the Statute of BD.

In paragraph 95 the majority undermine the role of the authorities contacted by the applicants by concluding that they did not have direct competence in the procedure for the appointment of the radio’s director.

All three authorities to which the letter was addressed are competent and obliged to take all necessary steps to fulfil the obligation under Article 20(1) of the Statute of BD and provide that “public employment with the District shall reflect the composition of the population”.

In their reasoning the majority focus on only one part of the letter in relation to the allegation against Ms M.S. and conclude that these three authorities have no role in the selection process, disregarding the fact that the public radio station was founded by BD and the highest authorities in BD are those to whom the letter was addressed.

*According to the Statute of the public company Radio Brčko (Article 8, paragraphs 3 and 4, the founder of the radio company is Brčko District BiH and the Assembly of Brčko District represents the founder of Radio Brčko. Article 27(1) provides that the Mayor (then Governor of BD) nominates the members of the board of the public radio company.*

These three authorities are the only bodies competent to deal with the issue of composition (or under-representation) of the Board and the appointment of the director of the public radio. No other institution is competent to deal with allegations such as the ones made in the present case.

In paragraph 105 the majority actually accept the Government’s submission that the impugned letter had served “as a means of political pressure” that had prevented the selection panel from appointing either of the candidates for the post”, which are tantamount to “alternative facts” suggested by the Government and heavily relied on by the majority. Contrary to its own conclusion, the judgment clearly addresses this question in paragraph 35. In that paragraph the judgment states: “According to the minutes of a meeting of the Management Board of the BD’s radio station dated 9 May 2003, there were two candidates for the post of the radio’s director, one of whom was M.S. The Management Board decided to extend the mandate of the acting director of the radio given that “due to political pressure and repeated voting” no decision could be made in respect of either of the candidates.” It appears that the main problem was “repeated voting”, which means that the political parties represented in the Assembly of the BD and their representatives on the Board could not reach an agreement on selection. As explained in the judgment, the applicants are NGOs and not a political party that can influence the voting process. As a result, the content of the letter which relates to Ms M.S. could not in any way influence the process of her selection for the post of director. It remains unclear why the majority attach importance to the Government’s position on this issue instead of the official minutes of the meeting of the Board. In any case the majority misinterpret the minutes of the meeting of the Board. Even though the majority distance themselves from the Government’s line of reasoning, observing that M.S. “was not appointed to the post of director of the BD radio” (see paragraph 105), they nonetheless refer to false background information submitted by the Government. The real question is why M.S. was not appointed to the post of director. “Due to political pressure and repeated voting”, as noted in the minutes of a meeting of the Management Board. Could this be attributed to the NGOs? Of course not. They are not in a position to take any political decisions.

In addition to that, the majority also mix up some crucial background information such as that in paragraph 94 in which they establish that “[t]hese issues were at least of considerable concern for the Bosniacs, represented by the applicants...” This is a very dangerous observation. The applicants are NGOs and Medžlis is a religious body of the Islamic Community in Bosnia and Herzegovina. Even if they represent Muslims and some Bosniacs any generalisation is very dangerous. Medžlis represents members of the Islamic faith. The other applicants are NGOs and it is clear that their intention as NGOs is to promote certain cultural values and the social position of Bosniacs but, again, they do not represent Bosniacs in the political sense implied by the majority in the judgment. There are so many examples throughout history of this kind of dangerous oversimplification.

In paragraph 115 the judgment states: “The Court considers that the verification of that fact prior to reporting would not have required any particular effort on the part of the applicant.” At the same time the majority could not establish which newspapers had published the applicants’ letter, nor on what date it had been published; nor did they check the alleged interview given to *NIN* by Ms M.S. The majority go even further, requiring that in all other similar cases where persons are reported to the authorities the applicant be obliged to give the person in question the opportunity to comment on the allegations against him or her. It would be interesting to see Mr Assange, for example, sending information – prior to disseminating it – for comment to those that are the subject of his reports.

The conclusion that there has been no violation of Article 10 is based on an oversimplified understanding of the scope of Article 10. The majority simply conclude that if the facts are untrue this will automatically lead to a finding of liability for defamation regardless of all other important factors: the nature of the information in question, to whom that information was submitted, in which form (confidential or public letter), by whom, and so on.

The fact that some of the allegations based on that information might have been shown, after investigation, to be unfounded or inaccurate cannot of itself vitiate the propriety of the applicants’ communication with the authorities. What is germane to the present case is that the applicants themselves made no definite or final assertions as to the facts. In terms of section 6 of the Defamation Act 2003, there was nothing they did that could fairly be regarded as tantamount to alleging a falsehood.

I would further emphasise that in this type of situation the communication should be seen in context. Account should be taken of the need to protect the reputation of the individual but also of the need to maintain confidence in the public administration by encouraging the involvement of citizens and addressing their concerns. People are entitled, in the discharge of their civic duties, to bring relevant information to the attention of the authorities and may, indeed, do so in strong terms in an attempt to persuade the authorities to scrutinise such information so as to ensure sound administration in public affairs. A person may sometimes overstep the mark and, where that happens, a proportionality exercise may be necessary. In the present case the highest domestic courts approached the case as if the applicants had actually gone further than they should have done. Even if that were the case the courts then failed, in my view, to carry out a meaningful examination of the relevant competing interests affecting the proportionality of State interference with the right to freedom of expression under Article 10.

Lastly, the majority also disregard the fact that a very strange symbiosis was established between the judiciary and the executive power in BiH. This was reflected in the presence of a judge from the Court of Appeal of BD – who had been directly involved in dealing with this case before the domestic courts – in the Government Agent’s team representing the State before this Court at the deliberations in this case. That is unprecedented.

Instead of a conclusion, the message should be understood that every word spoken or written in whatever form or forum is accountable. Lots of work is created for the judiciary in Bosnia and Herzegovina as a consequence of insulting words and messages disseminated by different persons, mainly politicians and political parties. By using these words they deny war crimes and genocide, and they insult the survivors of the tragic war in Bosnia and Herzegovina by their lies. They misinterpret the truth despite the facts that have been established by the ICTY and the domestic courts. The positive aspect of this judgment is that it opens the door to punishing those responsible for publicly uttered or written lies that insult others, but I wonder if this was really the goal of those who drafted Article 10 in order to protect freedom of expression?

DISSENTING OPINION OF JUDGE KŪRIS

1.  It is often said that hard cases make bad law. This case stands out as a hard one owing to one crucial imponderable, namely: who disseminated the information (which, in fact, was disinformation)? For had it not been disseminated, it is likely that this case, in which the central issue concerned the dignity and reputation of a person, M.S., tarnished as a result of that dissemination to a wider public, and not to the few people to whom the information was initially sent, would never have existed. The majority, like the Brčko District Court of Appeal and the Constitutional Court of Bosnia and Herzegovina, attribute the fact that the information in question was disseminated and the resulting harm *solely* to the applicants.

I do not want to be misunderstood. In no way do the majority openly assert that the information was disseminated by the applicants. On the contrary, the majority state that “the applicants’ liability for defamation should be assessed only in relation to their private correspondence with local authorities, rather than the publication of the letter in the media ... or any other means” and the judgment contains repeated assurances that “it was not proven that they had been responsible for its publication” (see, respectively, paragraphs 90 and 91 of the judgment). The applicants are found to be at fault *not for disseminating this information themselves, but for it having been disseminated*, because it was the applicants’ letter to persons whom they thought to be the competent authorities that started the process, which until then had been limited to rumours circulating in the city of Brčko (see, for example, paragraphs 101 and 114 of the judgment). They are found to be at fault for the outcome not because they initiated the process with a view to deliberately bringing about that outcome, which was the actual dissemination of the information in question and the ensuing harm done to M.S., but because they triggered the process involved. Though not directly blaming the applicants for the publication of their letter in the media, the majority blame them for “open[ing] a possibility for public debate and aggravat[ing] the harm to M.S.’s dignity and professional reputation” (see paragraph 106 of the judgment). The situation is comparable to a vendor being held responsible for “opening a possibility” to achieve the “end result” in a “process” in which he sold a gun to someone who then used it to shoot an innocent person. But there is – or should be – a difference between a situation where a vendor sells a gun to someone who is clearly an intoxicated furious madman with no identity papers and one where he sells it to someone who has all the requisite papers and there are no reasons to suspect that the gun might be used for harmful purposes. Holding the vendor equally responsible for the “end result” in both situations would not be fair. Case-law which permits such an equation *based on attribution of fault* in a situation like that of the applicants cannot be called fair law.

As a consequence of this hard case, we have bad law.

2.  I agree with the arguments expressed by the three dissenters in the Chamber case, Judges Nicolaou, Tsotsoria and Vehabović, as well as with many of the arguments of the latter judge expressed in his dissenting opinion in the Grand Chamber case (which I have had the privilege of reading before writing my own).

3.  I must admit at the very outset that I also agree, even if not in each and every detail, with the general principles relied upon in the instant judgment. However, I disagree with their application to the facts of the case. This application is based on at least four fictions. Too many for one case. What is more, these fictions are not “classic” legal fictions, which are often indispensable for finding legal solutions in complicated cases. They pertain to factual circumstances. *All* the unclear factual circumstances, *without a single exception*, have been interpreted to the detriment of the applicants.

4.  The first fiction is the inference that it was on account of the applicants’ conduct that the defamatory information was publicly disseminated because it was they who sent a letter containing defamatory information to the authorities, even if the notion of “authorities” here encompasses only a “limited number of State officials” (see paragraph 105 of the judgment). The applicants considered their letter to be “private and confidential” (see paragraph 54 of the judgment). The respondent Government maintained that that letter “contained no indication that it had been of a confidential nature” (see paragraph 58 of the judgment). The latter assertion is somewhat strange because it contradicts, to a certain extent, even the assessment of the nature of the correspondence by the Constitutional Court of Bosnia and Herzegovina, which accepted that the applicants’ correspondence with the Brčko District authorities was indeed private. The majority also accepted as much, reiterating their assessment that the information was of a private nature several times throughout the judgment (see paragraphs 33, 71, 83, 90, 91 and 105 of the judgment). Whereas “private” may not in all cases amount to “confidential”, the applicants’ assertion that their letter was not only “private” but also “confidential” deserved a much closer look, especially in view of the fact that it was sent not just to “someone”, but to the “State officials” of the “highest authorities” of the Brčko District, as acknowledged by the Court (see paragraphs 10 and 105 of the judgment). Their assertion also deserved closer examination in view of the provisions of Article 10 § 2 of the Convention, which, being the only Article of the Convention that explicitly underlines the duties and responsibilities of the freedom-holders, allows – and indirectly calls – for restrictions of the freedom of expression for “preventing the disclosure of information received in confidence”, at least where the dissemination of sensitive information may harm personality rights. Unfortunately, the judgment does not contain any analysis as to how the authorities (State officials), to whom the applicants’ letter containing such sensitive information was addressed, should have treated it under the domestic law, or to what they actually had or had not done to prevent the disclosure of that information, which could potentially harm the dignity and reputation of the person concerned. In particular, the telling fact that the person in question admitted that she had “learnt of the letter shortly after it had been sent by the applicants” (see paragraph 15 of the judgment), that is, not after it was published but prior to publication, should have been given due prominence and was not. The majority (like the domestic courts) are satisfied with Government’s submission that “letters sent to the authorities in the respondent State were frequently leaked to the public before the authorities could take any measure with respect to the information received” (see paragraph 60 of the judgment). The third-party interveners rightly warned against a low level of protection to citizens who reported information to the authorities which “encourage[d] the leaking of information to the public to the detriment of reporting to the competent authorities” (see paragraph 63 of the judgment), but this warning went unheeded. Instead, the majority confine themselves to accepting that “the applicants’ defamatory accusations ... had been leaked to the press” (see paragraph 106 of the judgment) – and this to the detriment of the applicants, not the authorities.

5.  The second fiction is the inference that the applicants did not act as messengers because even though they “had introduced their letter with the words ‘according to our information’ ... they “had not clearly indicated that they had acted as messengers” and, therefore, “implicitly presented themselves as having direct access to that information”, consequently, they “assumed responsibility for the statements included in their letter” (see paragraph 100 of the judgment).

This is simply not convincing. Does the conclusion reached mean that the authors of letters reporting allegations to the authorities now have to begin with the explicit caveat that they are “messengers”, and that expressions such as “according to our information” will no longer suffice? It is rather capricious to require that the applicants “explicitly [say] in the letter that part of the information which they passed on to the authorities had emanated from other sources”. A strange epistolary standard has indeed been introduced by the Court. But isn’t it the *whole* text of the letter which should matter? And the text in question contained the words “according to our information”, which meant that the applicants were in possession of some information, but not that they were its ultimate source. These words do not suggest at all that they had “direct access to that information”. Moreover, whether the applicants obtained this information from their direct, or maybe indirect, access to its sources, is of no relevance at all. Admittedly, the tone of the letter showed that the applicants fully believed that information to be true. However, this does not amount to their having “assumed responsibility for the statements included in their letter”.

6.  The third fiction is that the applicants should and could have verified the information which they included in their letter to the authorities prior to sending it. Of course, such verification would have been most desirable. Had the applicants been, to use the words of the Government, “more vigilant” (see paragraph 59 of the judgment) and had they verified that information and ascertained themselves that it was untrue, they probably would not have sent the letter.

The Brčko District Court of Appeal and the Constitutional Court of Bosnia and Herzegovina were of the opinion that the information contained in the letter *could* be verified (see paragraph 33 of the judgment). I respectfully disagree – at least in part. Indeed, the information as to the author, or “the lady in question” as the applicants called M.S. in their letter, of an interview published in the weekly *NIN*, could be verified (even if it was published in another country, Serbia). But it would not have been so easy to verify the information which served as a basis for other allegations against M.S. As a matter of principle, it is very difficult to verify the truthfulness of *rumours* as a very specific form of social communication. It would have been even more difficult for the applicants (as well as for many others, except the authorities which are probably the only ones in possession of the necessary administrative means) to be very “vigilant” and verify rumours in a society such as Bosnia and Herzegovina, which has been torn apart by long-standing inter-ethnic mistrust and even bloody conflicts, especially if those rumours go – as in the instant case – to the very heart of this mistrust. It is easy to conclude that the applicants can and must be blamed for not “making reasonable efforts” to verify the rumours (see paragraphs 33, 53 and 117 of the judgment). But what, in the circumstances, would have been more “reasonable” for them than to forward the rumour-based information (which they sincerely thought to be true) to the authorities for “appropriate reaction”, which, by definition, presupposed verification?

The majority have an answer to this question. They say that “an NGO performing a public watchdog role ... will *often dispose of greater means of verifying and corroborating the veracity of criticism* than would be the case of an individual reporting on what he or she has observed personally” (see paragraph 87 of the judgment; emphasis added). This is true in most cases. But can this presumption be correct and fully applicable in this particular case? What precisely could these “greater means” have been with respect to almost all the allegations (that is to say, except the one related to the authorship of the interview)? The majority do not name a single one.

The method employed by the majority in its analysis is dubious: it is *induction*. Having rightly said that “the verification of that fact [regarding the authorship of an interview] prior to reporting would not have required any particular effort on the part of the applicants” (see paragraph 115 of the judgment), they apply the same standard to *all the other allegations*. For instance, they state that the applicants did not produce ... any evidence that they had made any effort to *verify the veracity of that rumour* [regarding the coat of arms] before reporting it to the authorities” (see paragraph 114 of the judgment). However (and one does not have to go deeply into either David Hume or Karl Popper), while deductive inferences are certain, inductive inferences are only probable and have to be supported by additional evidence. Therefore I – again – ask the majority: how precisely can the truthfulness of rumours be verified in general, and how can it be verified in an adverse social environment in particular?

The majority seem to be satisfied with stating that “the applicants ... were bound by the requirement to verify the veracity of the allegations submitted against M.S. [which is] inherent in the Code of Ethics and Conduct for NGOs ... and it is to be seen in the context of the “responsibilities” in the operation of NGOs” (see paragraph 109 of the judgment). First of all, although the Fundamental Principles on the Status of Non-Governmental Organisations, to which the majority refer in the context of “‘responsibilities’ in the operation of NGOs” speak of “encourage[ment of NGOs] to participate in ... mechanisms for dialogue, consultation and exchange” (see paragraphs 45 and 86 of the judgment), the Code of Ethics referred to is subsequent to the material time, that is to say, to the time when the applicants sent their letter to the Brčko District authorities. But what is even more important is that the fact that “the applicants were perceived ... and, indeed, acted as representatives of the interests of particular segments of the population” in the Brčko District, in the majority’s opinion, “increased their *duty* to verify the accuracy of the information before they reported it to the authorities” (see paragraph 109 of the judgment; emphasis added). I can agree that the said *duty* was “increased”. This, however, does not mean that their *possibilities* also increased. It is not impossible that they could have decreased.

7.  The fourth fiction stems from the first three and crowns them all. It is that the applicants’ allegations against M.S. did not amount to a request for the authorities to verify that information. True, the tone of the applicants’ letter was in the nature of an ultimatum. Nevertheless (as already hinted in paragraph 6 above), an “appropriate reaction” by the “competent authorities” (who must also have sensed the pain permeating the applicants’ complaint) presupposed verifying the information received from the applicants. It does not appear from the information submitted to the Court that these authorities had done anything at all, at least before the letter was leaked to the media, notwithstanding that the “very first” complaint (completely overlooked by the majority) does not appear to have been baseless, as the inter-ethnic balance in the composition of the panel for the selection of the director of the radio was indeed not observed.

8.  In other circumstances I would have welcomed a similar judgment, which defends personality rights. Most unfortunately, judgments which defend personality rights against defamation are a rare bird in the Court’s case-law. However, in the specific circumstances of the instant case it is indeed difficult to accept that the applicants were responsible for making public the information provided in their letter to the Brčko District authorities and for the harm done to M.S. by this publicity. I have to repeat that this is not something which the majority state directly. However, the whole reasoning of this judgment has been an exercise in *implication by attribution*, an exercise in which *each and every* unclear factual circumstance has been interpreted to the detriment of the applicants, thus belittling the expression of their concerns about the dangers to the fragile inter-ethnic balance and civil peace in their troubled country and equating them to trivial rumour-spreading, and downgrading the applicants themselves to irresponsible and hidebound calumniators.

1. .  Brčko District is a self-governing administrative unit under the sovereignty of Bosnia and Herzegovina. According to its Statute, it is represented by the Governor (who is elected by the District Assembly). The legislative power is exercised by the District Assembly. The executive power is exercised by the District Government (presided over by the Governor). The judicial power is exercised by the District Courts (Article 19 of the Statute). [↑](#footnote-ref-1)
2. .  Bosniacs were known as Muslims until the 1992-95 war. The term “Bosniacs” should not be confused with the term “Bosnians”, which is commonly used to denote citizens of Bosnia and Herzegovina irrespective of their ethnic origin or religious affiliation. [↑](#footnote-ref-2)
3. .  The Statute of the BD is the Highest Act. Article 20(1) of the Statute provides that “public employment with the District ... shall reflect the composition of the population.” [↑](#footnote-ref-3)
4. .  Serbs are an ethnic group whose members may be natives of Serbia or of any other State of the former Yugoslavia. The term “Serb” is normally used to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with the term “Serbian” which normally refers to nationals of Serbia. [↑](#footnote-ref-4)
5. .  Croats are an ethnic group whose members may be natives of Croatia or of any other State of the former Yugoslavia. The term “Croat” is normally used to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with the term “Croatian” which normally refers to nationals of Croatia. [↑](#footnote-ref-5)
6. .  A weekly newspaper published in Serbia. [↑](#footnote-ref-6)
7. .  *Sevdalinka* is a “Bosnian-Herzegovinian urban song”, Cultural characteristics of Bosnian urban song - sevdalinka, Ms Karača Tamara, Music, I/1 (1), 1997: 55.  [↑](#footnote-ref-7)
8. .  One of the entites within Bosnia and Herzegovina. [↑](#footnote-ref-8)
9. “…M.S. stated that she had learned of the letter shortly after it had been sent by the applicants…” [↑](#footnote-ref-9)