

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2) and Article 62(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Mirsad Ćeman, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Helen Keller, Vice-President

Ms. Seada Palavrić,

Ms. Angelika Nussberger, and

Mr. Ledi Bianku

Having deliberated on the appeal of **RTV BN d.o.o. Bijeljina** in the case **AP-270/21**, at its session held on 13 July 2023, adopted

## **DECISION ON ADMISSIBILITY AND MERITS**

The appeal lodged by **RTV BN d.o.o. Bijeljina** is hereby granted.

A violation of the right under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The judgement of the County Court in Banja Luka no. 71 0 P 227347 19 Gž of 8 July 2020 is hereby repealed.

The case shall be referred back to the County Court in Banja Luka, which shall render a new decision in an expedient manner in accordance with Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The County Court in Banja Luka is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months as of the date of delivery of this Decision, about the measures taken to execute this Decision, as required by Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

## REASONING

### I. Introduction

1. On 26 January 2021, RTV BN d.o.o. Bijeljina (“the appellant”), represented by Mr. Miodrag Stojanović, a lawyer practicing in Bijeljina, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) against the Ruling of the Supreme Court of the Republika Srpska (“the Supreme Court”) no. 71 0 P 227347 20 Rev of 14 December 2020, the Judgement of the County Court in Banja Luka (“the County Court”) no. 71 0 P 227347 19 Gž of 8 July 2020 and the Judgement of the Basic Court in Banja Luka (“the Basic Court”) no. 71 0 P 227347 15 P of 23 August 2019.

### II. Procedure before the Constitutional Court

2. By its Decision on Admissibility *AP-3294/20* of 14 October 2020 (available at [www.ustavnisud.ba](http://www.ustavnisud.ba)), the Constitutional Court rejected as premature the appellant’s earlier appeal lodged against the contested judgement of the County Court, referred to in paragraph 1 of the present Decision, as the appellant had lodged a revision appeal against that judgement.

3. Pursuant to Article 23(1) of the Rules of the Constitutional Court, the County Court, the Basic Court and the plaintiff O.V. (“the plaintiff”) were requested on 27 June 2022 to submit their responses to the appeal.

4. The County Court and the Basic Court submitted the responses to the appeal on 6 and 14 July 2022. The plaintiff failed to submit the response.

5. On 22 July 2022, the Constitutional Court transmitted the responses to the appeal to the appellant, for observations. The appellant submitted no observations.

### III. Facts of the case

6. The facts of the case, as they appear from the appellant’s assertions and the documents submitted to the Constitutional Court, can be summarized as follows.

### **Introductory remarks**

7. By an inspection of the text available at [www.rtvbn.com](http://www.rtvbn.com) which was published on 15 September 2015, the Constitutional Court found that the text entitled “All affairs of the DNS’s Minister of Education” discusses the actions of Minister D.M. in connection with the establishment of a class in a Banja Luka secondary school, as well as the actions of the plaintiff in the said affair. A relevant part of the text reads: *The Minister of Education, Science and Culture [D.M.] became the participant in several affairs in a short period of “him being a minister”. The biggest one is setting-up an additional class in the Banja Luka Medical School. [...]. In fact, 28 students who failed in the regular enrolment deadline were enrolled in this additional class. It is true that he [M.] has the right to such a decision, but he did not adhere to the regulations on scoring; five students who did not apply at all in the June enrolment, but their names were inserted later, were enrolled. [...]. The ‘Faktor’ sources state that many of his fellow Ministers urged for the enrolment of their children, [...]. In the preparation of the list of students for the new, ninth class participated [...] and the Head of the Office [O.V., the plaintiff]. [...] The affair culminated in an alleged death threat received by telephone call to the Minister [M.], which, according to the ‘Faktor’ sources, was concocted in his Office, in order to divert attention specifically from the illegal enrolment of students. The idea that someone would call the Office of the Minister [M.] on the phone and call him a ‘Chetnik vice-duke’ and threaten to ‘carve the Bosnian language on his forehead’, as well as that everyone in the Office ‘will be slaughtered and pulled apart’, was allegedly born in the head of the Chief of Staff [O.V.]. As the reason for such threats, an unknown person cited the boycott of classes by the parents of Bosniak students, who demand that their children learn Bosnian, and not the language of the Bosniak people. ‘Faktor’ sources claim that [V.] bragged about how well he organized everything and that the phone card was destroyed immediately after the call to the Office. Incidentally, [V.] is well known for threats. He also made death threats to wife, whom he mistreats and who reported him to the police and the Centre for Social Work. However, the police in Laktaši, where he lives, did not respond to the report of [his] wife and her sister. The Centre for Social Work did, but upon learning that it concerned a Government official, all activities were suspended. [...].*

### **Procedure in which the contested rulings were adopted**

8. On 20 November 2015, the plaintiff lodged a defamation lawsuit against the appellant and D.S. The lawsuit against D.S. was subsequently withdrawn. The plaintiff’s claim was partially granted by the judgement of the Basic Court no. 71 0 P 227347 15 P of 23 August 2019 and the

appellant was obliged to pay the plaintiff a sum of BAM 1,000.00, with statutory default interest and the costs of proceedings, as a compensation for damage to his reputation due to defamation. The plaintiff's claim over the awarded amount for the main claim as well as the compensation for the costs of proceedings over the awarded amount was dismissed.

9. In the reasoning, the Court, *inter alia*, states that the appellant published the text, cited in the introduction of the present Decision, on the website, and at *Dnevnik 1* news broadcast on 16 September 2015. In addition, it is established that the appellant failed to comply with the plaintiff's request for the delivery of the audio-visual record of *Dnevnik* broadcast. The Basic Court points out that the appellant raised the objection on the lack of standing to be sued in connection with the impugned text. Furthermore, it indicates that it is disputed between the parties to the proceedings whether the appellant's dissemination of information (impugned text) constitutes defamatory statement, as well as whether the plaintiff is entitled to compensation for the pain suffered.

10. The Basic Court referred to the content of Articles 1, 5 and 6 of the Law on Protection against Defamation ("the LPD") and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") and dismissed the appellant's objection on the lack of standing to be sued. The reasoning indicates that the objection is unfounded "primarily because the *Dnevnik* broadcast, in the defendant's presentation, disseminated the allegations from the [impugned] text, and the claims thereof that the internet domain [www.rtvbn.com](http://www.rtvbn.com) was transferred to certain Aleksandar Kamenjašević by the Contract on the business and technical cooperation is ill-founded". The Basic Court points out that it appears from the Contract (Article 6) that the appellant "has a possibility to influence publication of specific pieces of news, as it kept the right to cancel the Contract if the other party to the Contract fails regularly to update the website with up-to-date news". The court concluded that the appellant "is one of the liable persons in terms of the provision of Article 5 of the LPD" as it has the possibility "efficiently to control the contents of such statements in another manner".

11. The court further states that based on evidence presented (statement of the plaintiff, inspection of the impugned text, the audio-visual records of *Dnevnik 2 and 3* broadcasts, and the Contract on business and technical cooperation) it follows that "the claims of the lawsuit are correct that by disseminating or reporting certain facts relating to the plaintiff, [the appellant] published certain pieces of information, which tarnished the plaintiff's reputation". The Basic Court points out that "the impugned statements of the defendant, which it disseminated on in its informative

broadcasts, contains the elements of defamatory statements at the expense of the reputation and dignity of the plaintiff due to the fact that untruths were presented and disseminated...”, and the content of the impugned text relating to the plaintiff is repeated. Concerning the compensation for damage, the Basic Court accepted the plaintiff’s statement that he was exposed to the appellant’s “media story” which desecrated his honour and reputation, which he “endured with difficulty”. The plaintiff also stated that he and his family “are experiencing unpleasant situations in their surroundings”. The Basic Court determined the amount of compensation for damage by the application of Article 200 of the Law on Obligations, concluding that “the defendant’s statements or in fact dissemination of such statements caused emotional distress of the plaintiff and his mental pain and suffering”. In addition, it is determined that, at the time the impugned text was published, the plaintiff held the position of the Head of the Office of the Minister D.M., as well as that the appellant did not contact the plaintiff before or after publishing the impugned text and broadcast. Furthermore, it is established that no retraction was published and that the impugned text is still accessible on the appellant’s website.

12. In judgement no. 71 0 P 227347 19 Gž of 18 July 2020, the County Court dismissed the appeals of the parties and upheld the first instance judgement. In the reasoning of the judgement, the County Court states that the judgement of the first instance court is correct and lawful and that it is not called into question by the appeals of the parties. The County Court, *inter alia*, states that the appellant failed to prove in the course of proceedings that the allegations set forth in the impugned text are true. It further points out that the appellant, by publishing the text on the website and in the news broadcast, “presented false information, thereby portraying the plaintiff as a violent person who is prone to abusive behaviour when his family is concerned, and as a person prone to fraudulent behaviour and manipulations when his job is concerned, by which they tried to characterize him as a person who is inclined to commit the criminal offence of a violent behaviour”. The County Court found correct the conclusion of the first instance court that the plaintiff “suffered mental pain due to tarnishing of reputation and honour” and that an appropriate amount was awarded to him for the compensation for damage. In addition, the County Court states that the first instance court appropriately considered the objection of the lack of standing to be sued. In that connection, it points out that the defendant disseminated the statements made by [D.S.] from the press conference which were found to constitute defamation. It also points out that the defendant is liable for disseminating such statements for the purpose of Article 5(1) of the LPD, given that defamation is not only a presentation but also dissemination of false information”. The County Court concluded that the appellant failed to prove truthfulness of the content of the disseminated

impugned text. The text read, “that the plaintiff was the creator of the plan falsely to present to the public information that the Minister of Education and Culture of the Republika Srpska received a death threat, by phone, in connection with the requests of the Bosniak population for their children to have their education in Bosnian language”. In addition, the County Court stated that the plaintiff is currently holding an office of the Executive Director of the Company *Kozaraputevi* and that he is a council member at the Municipality Laktaši, and that he is a person who enjoys a reputation in the community. On the other hand, the County Court concludes that withdrawal of the lawsuit relating to D.S. is of no consequence to the issue of the appellant’s liability given that the plaintiff has the right to dispose of his lawsuit and the claim.

13. By the ruling of the Supreme Court no. 71 0 P 227347 20 Rev of 14 December 2020, the appellant’s revision appeal is rejected for formal reasons. It is reasoned that the revision appeal does not meet the admissibility requirements set out in Article 237(2), (3) and (4) of the Civil Procedure Code.

## **IV. Appeal**

### **a) Statements of the appeal**

14. The appellant indicates that the impugned decisions are in violation of his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention and the right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention.

15. The appellant holds that the violation of the right to a fair trial occurred due to the arbitrary assessment and establishment of facts and by proceeding contrary to the case law concerning the determination of the acceptable restrictions to freedom of expression. The appellant alleges that the ordinary courts in the course of proceedings failed to consider all legal elements of defamation. They reached the conclusion on the existence of defamation based on the alleged untruthfulness of claims disseminated, while they disregarded the relevant legal provisions and consistent case law. The appellant points out that the ordinary courts in the particular case did not take into account “whether it concerns an issue of public and political interest and whether the damaged party is a public figure or civil servant, *i.e.*, the holder of some public function. This is crucial in determining whether journalists acted in good faith, as well as the issue of the nature and types of damage which occurred due to the dissemination of some news”. In particular, the appellant holds that the courts erroneously and arbitrarily established its liability for defamation. The reason being that it

disseminated the statements of officials of the opposition parliamentary parties made at the press conference, which were simultaneously reported by a number of other media companies. In this connection, the appellant refers to the Decision of the Constitutional Court in case *AP-4643/17*. In addition, the appellant considers arbitrary the conclusion of the courts on his liability regarding the impugned text, which was published on the portal [www.rtvbn.com](http://www.rtvbn.com). In this connection, the appellant indicated that the author of impugned text is the magazine *Faktor*, that the conclusion on its liability for statements reported on the website is arbitrarily reached. It does not have the standing to be sued in the particular proceedings. It also points out that it is not the author of the impugned statements or the owner of the impugned website/portal and does not have the control over the contents of other authors disseminated on the portal except for the contents of which it is the author. Indeed, it does not have the standing to be sued in terms of Article 5 of the LPD. In this context, the appellant refers to the decision of the Constitutional Court. The Court, “in deciding on a violation of the appellant’s rights on the identical legal issue and facts established that the ordinary courts, failed correctly to assess the appellant’s objection of the standing to be sued, and that his right to freedom of expression has been violated in that way”. The appellant proposed the Constitutional Court to grant the appeal and establish the violation of the aforementioned rights.

#### **b) Response to the appeal**

16. The County Court states that it entirely maintains the reasons given in the reasoning of the contested decision, as well as that the appellant’s rights stated in the appeal have not been violated in the instant case.

17. The Basic Court holds that allegations of the appeal are ill-founded. It points out that it maintains its conclusions as to facts and law contained in the reasoning part of its decision in full.

### **V. Relevant Law**

18. The **Law on Protection against Defamation** (*Official Gazette of RS*, 37/01)

#### *Article 1*

*(1) This law regulates the acceptable limitations of freedom of expression with regard to civil liability for damage caused to the reputation of a natural or legal person by stating or conveying something untrue and confirms that:*



*a) the right to freedom of expression, which is guaranteed by the Constitution of the Republic of Srpska and the European Convention for the Protection of Human Rights and Fundamental Freedoms, is one of the foundations of a democratic society, especially when it comes to matters of political and public interest;*

*b) the right to freedom of expression protects the content of the expression, as well as the manner in which it is presented and is not only applied to expressions that are considered useful or non-offensive, but also to those that can offend, shock or disturb;*

*v) the media have a very significant role in the democratic process as public observers and suppliers of information to the public.*

#### *Article 5(1), (2) and (3)*

*1. Any business-capable person who causes damage to the reputation of a natural or legal person by stating or conveying an expression of something untrue, identifying that person to a third party, is liable for defamation, if that person caused damage in the capacity of the author, editor or publisher of the expression, or in the capacity the person who effectively controlled the content of that expression in some other way, as well as the legal entity that published the expression.*

*2. The person referred to in paragraph 1 of this article is liable for the damage caused if he intentionally or due to carelessness expressed or communicated the expression.*

*3. When the expression refers to matters of political or public interest, the person referred to in paragraph 1 of this article is liable for the damage caused by expressing or passing on the expression if that person knew that the expression was untrue or neglected the untruth of the expression through negligence. The same standard of liability applies if the injured party was or is a public official or a candidate for office in a public body and if, according to the general understanding of the public, he exerts significant influence on matters of political or public interest.*

#### *Article 6*

*In the following cases, one shall not be liable for defamation:*

*a) if it is an expression of opinion or when the expression is essentially true;*

*b) if the person who allegedly caused the damage was obliged by law to make or convey the expression, or to make or convey the expression during legislative, judicial or administrative proceedings;*

*v) if the presentation or transmission of the expression was reasonable.*

*When the court renders such a decision, it shall take into account all the circumstances of the case, especially including: the manner, form and time of the expression or conveying of expression, the nature and degree of the damage caused, the good faith and adherence to generally accepted professional standards by the harmed party, the likelihood that the damage would have occurred if the expression was not presented or conveyed, information on whether the expression contains objective and accurate information about the expression of other persons and whether it refers to issues from the private life of the injured party or issues of political or public importance.*

## **VI. Admissibility and Merits**

19. The Constitutional Court establishes that the appeal meets the requirements laid down in Article VI(3)(b) and Article 18(1) of the Rules of the Constitutional Court, as well as that it is lodged within the given time limit, that it meets other requirements regarding the admissibility provided for in Article 18(3) of the Rules of the Constitutional Court and that it is not manifestly (*prima facie*) inadmissible in terms of the provision of Article 18(4) of the Rules of the Constitutional Court.

20. The appellant indicates that the impugned decisions are in violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention and the right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention.

21. The Constitutional Court will first examine the appellant's allegations concerning the alleged violation of rights under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention.

### **Right to freedom of expression**

22. Article II(3) of the Constitution of Bosnia and Herzegovina reads:

*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.*

23. Article 10 of the European Convention reads:

*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

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

24. The Constitutional Court recalls that the right to freedom of expression under Article 10 of the European Convention applies not only to “information” or “ideas” that are favourably received or are regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (see, European Court of Human Rights, *inter alia*, *Handzhiyski v. Bulgaria*, judgement of 6 April 2021, Application no.10783/14, paragraph 58 and the Decision of the Constitutional Court *AP-1890/20* of 26 January 2022, paragraph 39). However, this freedom is not absolute and may be limited due to the circumstances and under the conditions specified in Article 10(2) of the European Convention, under which public authorities may interfere with the enjoyment of the right to freedom of expression. Therefore, the key role and task of the independent judiciary is clearly to determine in each individual case the boundary between justified and necessary, and unjustified and unnecessary restrictions, which confirm a principle as a rule or deny it as a mere declaration.

25. When the restrictions of Article 10(2) of the European Convention are concerned, in the case law of the European Court of Human Rights, which is followed by the Constitutional Court, a test is applicable that answers the following questions: whether there is an interference with the right to

freedom of expression, whether the interference is prescribed by law, whether it pursues a legitimate aim and, finally, whether the interference is “necessary in a democratic society” (see, *inter alia*, European Court of Human Rights, *Medžlis Islamske zajednice Brčko and Others v. Bosnia and Herzegovina*, Judgement of 27 June 2017, Application no. 17224/11, paragraph 67).

26. Examining the said standards in the instant case, the Constitutional Court has no doubt that the impugned judgments interfered with the appellant’s right to freedom of expression, since the appellant is obliged to compensate damages for the expression it presented about the plaintiff. The Constitutional Court also has no doubt that the aforementioned interference is “prescribed by law” as it is based on the provisions of Articles 5 and 6 of the LPD and Article 200 of the Law on Obligations, and that it had a legitimate aim - the protection of the reputation or rights of another. The next issue that the Constitutional Court should examine is whether this interference was “necessary in a democratic society”.

27. The Constitutional Court observes that the appeal raises the issues of protection of the appellant’s right to freedom of expression under Article 10 of the European Convention in connection with the right to protection of the plaintiff’s reputation under Article 8 of the European Convention. Accordingly, the Constitutional Court will examine whether the County Court struck a fair balance between these two equally important rights by the challenged decision. The Constitutional Court recalls that the relevant criteria for the proportionality test in such cases are established in the case law of the European Court of Human Rights (see, *inter alia*, *loc. cit.* *Medžlis Islamske zajednice Brčko, v. Bosnia and Herzegovina*, paragraph 77 and *Milosavljević v. Serbia* (No. 2), Judgement of 21 September 2021, Application no. 47274/19, paragraph 57). The criteria are: contribution to the discussion of a public interest, how well-known is the person in question and what is the subject of reporting, behaviour of the person in question before publication, content, form and consequences of publication and, where applicable, the severity of sanction. In addition, the Constitutional Court recalls that in numerous cases, the European Court of Human Rights considered that the lack of “relevant and sufficient” reasoning by domestic courts or the failure to take into account the applicable standards in the assessment of contested interference, will lead to a violation of Article 10 of the European Convention (see, European Court of Human Rights, *Uj v. Hungary*, Judgement of 19 July 2011, Application no. 23954/10, paragraph 19 to 26, and *Mariya Alahkina and Others v. Russia*, Judgement of 17 July 2018, Application no. 38004/12, paragraph 264).

28. With regard to the above, the Constitutional Court observes that the plaintiff made allegations of defamation in connection with the text that was published on the appellant's website and with the topics that were published in the appellant's news broadcasts. Analysing the contested decisions in the light of the aforementioned standards, the Constitutional Court first observes that the ordinary courts found that the appellant published the impugned text on the Internet and that he transmitted it in his news broadcasts, and that they concluded that the impugned text was untrue. In addition, the Constitutional Court notes that the impugned text states that the plaintiff participated in the scandal of "setting-up an additional class at the Banja Luka Medical School", that the plaintiff's idea was for someone to call the Office of the Minister [M.] and threaten the Minister and the employees, as well as that the plaintiff threatens and harasses his spouse. The Constitutional Court particularly points out that apart from the general finding that the content of the impugned text is untrue and represents defamation, the ordinary courts did not reason how they came to that conclusion. On the other hand, the Constitutional Court notes that it follows from the reasoning of the contested decisions that the appellant's news broadcasts transmitted "the statements made [D.S.] at the press conference". However, the Constitutional Court observes that the courts in their decisions did not present the content of the statements at all, so it remained extremely unclear what was stated and in what context, that is, what the appellant disseminated in his news broadcasts.

29. In addition, the Constitutional Court notices that, in the course of proceedings, the appellant persistently pointed out that the magazine *Faktor* was the author of the impugned text that was published on the appellant's website, and that the appellant only disseminated in the news broadcasts the statements that were given at the press conference. Thus, in the particular case the issue arises as to whether this case concerns the issue of presentation of appellant's statements or the issue of "dissemination" of the information and views, which is something that the courts have not dealt with particularly. In that connection, the Constitutional Court recalls that in Decision *AP-4643/17*, to which the appellant referred in its appeal, it pointed out the case law of the European Court of Human Rights. The Constitutional Court referred to the case in which it examined the issue of the liability of a journalist for reporting information and views, and it was concluded that the said case law may be applied to reporting from the press conferences as well (see, Constitutional Court, Decision on Admissibility and Merits *AP-4643/17* of 30 October 2019, paragraph 36, available at [www.ustavnisud.ba](http://www.ustavnisud.ba)). In addition, the Constitutional Court recalls the standpoints referred to in Decision *AP-5204/15*, wherein the Constitutional Court assessed whether the second defendant "who reposted the impugned articles from other websites" acted in good faith (see, Constitutional Court, Decision on Admissibility and Merits *AP-5204/15* of 13 March 2018,

paragraph 43, available at [www.ustavnisud.ba](http://www.ustavnisud.ba)). However, although the responses to these questions were relevant for determination of the merits of the claim, in the instant case, the ordinary courts failed to consider the appellant's allegations in that connection. In addition, the ordinary courts also failed to analyse whether the appellant acted in good faith in the particular case.

30. In addition, the Constitutional Court notes that the ordinary courts did not deal with the content of the impugned statements at all but established the appellant's liability solely because the text was published on the website and disseminated in the appellant's news broadcasts. Therefore, the ordinary courts failed to give sufficient and relevant reasoning on the issue of the appellant's liability, based on which it could be understood why they concluded that the appellant was liable for presenting the defamatory statements in the particular case. At the same time, the Constitutional Court notes that, in the course of entire proceedings, the appellant was raising the issue of standing to be sued because the website on which the impugned text was published had been transferred to another person by the Contract on business and technical cooperation. The Constitutional Court points out that it considered that issue in the context of the same Contract in its Decision on Admissibility and Merits *AP-770/19* of 14 October 2020 (available at [www.ustavnisud.ba](http://www.ustavnisud.ba), paragraph 42) in which it granted the appeal. In the procedure of enforcement of the mentioned decision of the Constitutional Court, the County Court adopted a new decision, which the ordinary courts should take into account when considering the objection of the lack of standing to be sued.

31. The Constitutional Court reiterates that the case law of the European Court of Human Rights, which the Constitutional Court follows, results in a whole range of criteria that may be relevant in weighing rights and interests when deciding on potentially conflicting rights, the right to reputation and the right to freedom of expression (see paragraph 27 of the present Decision). In that context, the Constitutional Court observes that the ordinary courts did not consider at all whether the contents of the impugned article or broadcast were the facts or value judgements not susceptible of proof. They also did not consider whether the text or broadcast should be valued in relation to the position of the plaintiff as a private person or a public figure required to display a greater degree of tolerance. In addition, the ordinary courts failed to consider whether there was a public interest in presenting the information in question and how the appellant obtained it or whether they had emanated from third parties. In failing to examine the relevant criteria, the courts in fact, *a priori*, gave priority to the plaintiff's interest in protecting his right to reputation over the appellant's interest in informing the public about potentially relevant issues of public interest (see, European Court of Human Rights, *Novaja Gazeta and Others v. Russia*, judgement of 10 January 2023,

Applications nos. 35023/13 and 25657/15, paragraph 10). Thereby, the ordinary courts failed to strike a fair balance when protecting the two competing rights – the right of the plaintiff to reputation safeguarded by Article 8 of the European Convention and the right of the appellant to freedom of expression guaranteed by Article 10 of the European Convention.

32. Therefore, in view of the above case law as well as the established relevant criteria, the Constitutional Court holds that the ordinary courts in the present case failed to give the “relevant and sufficient reasons” based on which it could be concluded that the interference with the appellant’s right to freedom of expression was “necessary in a democratic society”. Therefore, there has been a violation of the appellant’s right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention.

### **Right to a fair trial**

33. In view of the conclusion concerning a violation of freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention, the Constitutional Court holds that it is not necessary separately to reason the objections concerning the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

### **VIII. Conclusion**

34. The Constitutional Court concludes that there is a violation of the appellant’s right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention. The violation is found as the ordinary courts, in the absence of an adequate analysis of the content of the impugned statement, failed to give “relevant and sufficient reasons” based on which it could be concluded that the interference with the appellant’s right to freedom of expression was “necessary in a democratic society”.

35. Having regard to Article 59(1) and (2) and Article 62(1) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

36. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Valerija Galić

President  
Constitutional Court of Bosnia and Herzegovina