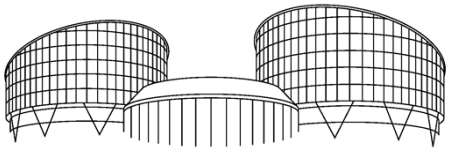

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF STANCU AND OTHERS v. ROMANIA

(Application no. 22953/16)

JUDGMENT

Art 10 • Freedom of expression • Civil sanctioning of editors and editing company of online publication for publishing defamatory article about the then vice-president of the High Council of the Judiciary and alleging the commission of a miscarriage of justice in her–earlier role as a superior prosecutor • Absence of fundamental distinction in national judicial system between status of judges and prosecutors • Safeguarding impartiality, independence and authority of prosecutors' decisions a key element for preserving confidence in the proper functioning of the national justice system • Measure pursuing legitimate aim of maintaining the authority of the judiciary • Impugned statements with a sufficient factual basis and within the wider acceptable limits of criticism in view of the public office held • Relevant yet insufficient reasons given • Sanction capable of having dissuasive effect on exercise of freedom of expression

STRASBOURG

18 October 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Stancu and Others v. Romania,

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

Yonko Grozev*, President,*
Tim Eicke,
Krzysztof Wojtyczek*,*
Faris Vehabović*,*
Armen Harutyunyan*,*
Pere Pastor Vilanova*,*
Jolien Schukking*, Judges,*
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 22953/16) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Romanian nationals, Ms Adina-Isabella Stancu and Mr Ovidiu-Răzvan Savaliuc, and a Romanian company, Jurindex Media S.R.L. ("the applicants"), on 21 April 2016;

the decision to give notice to the Romanian Government ("the Government") of the application;

the parties' observations;

the withdrawal from the case of Ms Iulia Motoc (Rule 28 §§ 2 and 3 of the Rules of Court), the judge elected in respect of Romania, and the appointment by the President of Mr Krzysztof Wojtyczek to sit as *ad hoc* judge (Rule 29 § 1);

Having deliberated in private on 17 December 2021 and 30 August 2022,

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

INTRODUCTION

1. The applicants complained that the sentence imposed on them for a press article published in a publication they were editing breached their right to freedom of expression. They relied on Article 10 of the Convention.

THE FACTS

2. Ms Adina-Isabella Stancu ("the first applicant") and Mr Ovidiu-Răzvan Savaliuc ("the second applicant") were born in 1964 and 1967 respectively, and live in Bucharest. The company Jurindex Media S.R.L. ("the applicant company") was created in 2010 and is registered in Bucharest. The applicants were represented by Mr C.L. Popescu, a lawyer practising in Bucharest.

3. The Government were represented by their Agent, Ms O. Ezer, of the Ministry of Foreign Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The first two applicants are journalists and editors working for the online publication *Lumea Justiţiei*. The applicant company is the company which edits the publication.

6. According to a presentation published on its website, the publication describes itself as the only online daily newspaper in the country which covers the field of justice and "deals with the real problems" of the judicial system. The presentation further states that two years after its launch in 2010, the publication's website had an average of 20,000 to 30,000 visitors per day, that the profile of its readers consists of people between the ages of 21 and 69 with legal or economic training, and that 60 per cent of those visitors accessed the publication from State and private institutions, including the Ministry of Justice, the Ministry of Finance and the Ministry of Administration and Interior.

I. BACKGROUND TO THE CASE

A. The charges against N.T. and his committal for trial

7. Between 5 November 2004 and 12 December 2005, N.T. was detained pending trial on charges of aggravated murder and attempted aggravated murder, because he had allegedly intentionally crashed his car into the car belonging to his girlfriend's ex-boyfriend out of jealousy, and the latter person's car, which was occupied by two other persons, had plunged into a river on impact. The driver of the car died and the two passengers survived.

8. On an unspecified date in 2005, a prosecutor attached to the Bacău Prosecutor's Office, namely V.P., indicted N.T. on the charges of aggravated murder and attempted aggravated murder. N.T.'s indictment was confirmed by a superior prosecutor attached to the same prosecutor's office, namely O.S.H., and the case was sent to trial.

B. The judgment of the Bacău County Court

9. On 2 July 2008 the Bacău County Court acquitted N.T. of the charges brought against him. It held that as the three expert reports produced in the case could not confirm the existence of an impact between the two vehicles and the testimonial evidence was partly contradictory, N.T.'s guilt could not be established beyond reasonable doubt. In reaching that conclusion, the court took into account, *inter alia*, the following elements.

10. One of N.T.'s victims had stated before the court that she had informed the prosecutor of the fact that she had not herself recollected the events described in her statement. Nevertheless, the prosecutor had not made a written note of her disclaimer.

11. During the first interview of the witness C.Z. – who was the only eyewitness close to the site of the crash and who had been interviewed four times at the investigation stage of the proceedings, including once during a reconstruction of the accident and once while being filmed –, the prosecutor had breached the procedural rules requiring that a parent of an under-age witness be present during the interview. C.Z.'s mother had assisted him only during his third interview.

12. According to C.Z.'s second statement (which had been filmed) and to the one made during the reconstruction of the accident (the fourth one), he had not seen the cars crash into each other but had only heard two thumps. His credibility was also doubtful because of the details he had known about the relationship between two of the victims of the incident and the defendant, and because of the fact that he was familiar with the defendant's car, even though he had stated before the court that he had never seen the defendant before.

13. The prosecutor had ignored the defence lawyer's lawful request to be notified of the date of C.Z.'s third interview in order to be able to attend. In addition, C.Z. had not maintained before the court the statements he had made at the criminal investigation stage of the proceedings, because he stated that he had been insulted and threatened by the prosecutor and that he had given his first three statements in the absence of his mother, who had been brought in only to sign his third statement. C.Z. had also stated before the court that he had not seen the victim's car before it had fallen into the river, that he had heard a thump and had not seen anything else, and that the distance between the bar and the bridge had been 300 metres. The witness had stated further that his statement before the court had been similar to the ones made during his first interview and during the reconstruction of the accident, and that the prosecutor had told him what to write in his first statement.

14. When examining C.Z.'s statements, the court noted that his statement before the court was the truth, since his statement made during the accident's reconstruction corroborated his filmed statement where it could be seen that the witness had not stated that he had seen the defendant's car hit the victim's car.

15. Two expert reports had been produced at the criminal investigation stage of the proceeding. The first was produced by the I. Laboratory and concluded that the defendant's car had had a single trace of dynamic friction on the rubber band of the left-hand side of the back bumper, whilst traces of an impact had been identified on the right-hand side of the back of the victim's car. The court noted that the traces identified on the defendant's car were not created by physical contact between the two cars, and that the infrared spectrometric analysis of a piece of the victim's car's back spoiler from the area presenting the traces of an impact had not revealed the presence of material from the defendant's car's front bumper. The statement in the act of indictment that this expert report had confirmed the impact between the

two vehicles because traces of friction could be found on the defendant's car was false, given that those traces were found on the back and not the front bumper of the defendant's car, as would have been the case if it had hit the victim's car. The second expert report produced at the investigation stage of the proceedings, and the only one incriminating the defendant, was produced by a specialist engineer and not by an authorised expert. The prosecutor had not relied on any special reasons explaining his need to use this specialist and not authorised experts.

16. In these circumstances, the court could not rely on the conclusions of the second expert report. In addition, the court noted that because of the blatant contradictions between the two expert reports, which had not been clarified by the prosecutor ordering a third expert report as required by law, it had ordered other expert reports in order to determine the dynamics of the accident and whether there had been any physical contact between the two vehicles.

17. The expert reports had concluded that it could not be said that there had been any contact between the two vehicles before the traffic incident took place, and that it could not be established whether crashing into the deceased's car could have caused the car to collide with the barrier and to fall in the river, since the time when and the place where the deceased had lost control and the extent of the manoeuvres he had performed were not known.

18. The court noted that it had to base its conviction about a defendant's guilt on certain and clear evidence when delivering a guilty verdict. However, the evidence against the defendant was uncertain, indecisive, or incomplete, leaving room for doubt about his guilt, and therefore it had to apply the *in dubio pro reo* principle. Such principle was a matter of fact before it could become a matter of law. The court took the view that as long as a person's guilt was still doubtful, even though as a matter of fact evidence had been adduced in support of prosecution and other evidence could not be envisaged or simply had not existed, then this doubt was "the equivalent of a positive proof of innocence" and therefore the defendant had to be acquitted.

C. Further appeals against N.T.'s acquittal

19. On 16 December 2008 the Bacău Court of Appeal dismissed an appeal by the Bacău Prosecutor's Office against the judgment of 2 July 2008 and upheld N.T.'s acquittal on the ground that the available evidence had not proven that he had committed the offence. The court reiterated most of the first-instance court's reasons for acquitting N.T. (see paragraphs 9-10, 12-15, and 17-18 above). In addition, it noted that all the reasons mentioned in paragraphs 12-14 above proved that C.Z.'s statement at the investigation stage of the proceedings had been suggested to him.

20. By a final judgment of 11 June 2009, the High Court of Cassation and Justice dismissed as ill-founded an appeal on points of law by the Bacău Prosecutor's Office against the judgment of 16 December 2008.

D. N.T.'s criminal complaint against V.P. and O.S.H.

21. On 3 May 2012 N.T. lodged a criminal complaint against V.P. and O.S.H. (see paragraph 8 above) for serious abuse of office. He argued that the case prosecutor, V.P., had intentionally violated N.T.'s lawful rights by dismissing his requests for a confrontation with the witness C.Z. and for a new expert report to be produced in the case given the contradictory conclusions of the first two reports.

22. N.T. argued further that his rights had also been violated because of the suffering and humiliation he had been subjected to as a result of his unlawful pre-trial detention and the false charges brought against him. Lastly, N.T. contended that O.S.H., in her position as superior prosecutor, had committed the offence in question because the above-mentioned violations of his rights had been evident and should have led to the act of indictment being invalidated in accordance with the relevant procedural rules. The confirmation of the act of indictment had made it possible for his case to be sent to trial and for a considerable amount of time to elapse before he could prove that he was innocent, even though that conclusion could already have been reached at the criminal investigation stage of the proceedings.

23. On 27 August 2012 the prosecutor's office attached to the High Court of Cassation and Justice discontinued the criminal proceedings against V.P. and O.S.H. on the ground that the offence in question did not exist. It held that under the relevant national law, the assessment of the legal classification of the acts under investigation, the identity of the perpetrator and his or her guilt, the truthfulness of certain statements, and the factual circumstances reflected by the available evidence were within the exclusive jurisdiction of the judicial body seised of the case. The first-instance court had maintained N.T.'s pre-trial detention until a different factual situation had emerged because witnesses had changed their statements and new expert reports had been produced.

24. The prosecutor's office further held that the first-instance court's judgment had found that the evidence adduced had been insufficient to prove N.T.'s guilt, and not that no evidence had been adduced during the criminal investigation in the case. The fact that one of the witnesses had changed his statement and that the injured parties had modified their statements by citing memory problems and feelings of confusion as reasons for their previous statements, could not mean that the prosecutors accused by N.T. had in any way violated their professional obligations.

25. On 9 April 2013 the High Court of Cassation and Justice dismissed as ill-founded an appeal by N.T. against the decision of the prosecutor's office of 27 August 2012.

II. THE ARTICLE

26. On 2 August 2012 the journalist R.L. published an article in the publication *Lumea Justiţiei* concerning O.S.H., the superior prosecutor who had confirmed the indictment against N.T. (see paragraph 8 above). At the time O.S.H. was a prosecutor who was an elected member and vice-president of the High Council of the Judiciary (*Consiliul Superior al Magistraturii* – "the CSM"), an independent body that seeks, among other things, to safeguard the independence of the judiciary and the independence, impartiality and professional reputation of individual judges or prosecutors, to contribute to the efficient organisation and functioning of courts and prosecutor's offices and thereby to promote the efficient functioning of the justice system.

27. Under the headline "The CSM vice-president, [O.S.H.], fails to provide explanations for the serious miscarriage of justice [committed] by her – [O.S.H.] and the prosecutor [V.P.] indicted a student for murder, who remained in detention for 13 months but was acquitted because he was not the perpetrator. Find out [about] the prosecution's abuses, noted by the judges in this case!", the article read:

> "Lumeajustiţiei.ro has asked the [CSM]'s Press Department for an opinion from the CSM's vice-president O.S.H. (photograph) with regard to the press article published on 29 July 2012 under the headline: '[O.S.H.] and the prosecutor [V.P. from Bacău] have pinned on a student a murder committed by someone else. The young man remained in detention for 13 months while innocent, as he was acquitted by all of the courts on the grounds that he was not the perpetrator. The judges noted the pressure [put] by the prosecutors on [the] witnesses'. Even though we have asked for written explanations through the CSM's Press Department, so far [there has been] silence. [O.S.H.] was asked for her point of view given that in ... 2005, when she was a superior prosecutor attached to the Bacău Prosecutor's Office ... she confirmed the act of indictment [produced by] prosecutor [V.P.], who committed reprehensible acts in order to send the student['s case] to trial on charges of aggravated murder which were noted by the judges of the Bacău Court of Appeal in decision no. 158 of 16 December 2008.
>
> Here are some of the prosecutor [V.P.]'s abuses which Lumeajustiţiei.ro has reminded the CSM's vice-president, [O.S.H.] about, in the written request [made] to the Press Department.
>
> To remind the former superior prosecutor attached to the Bacău Prosecutor's Office ... [O.S.H.] the abuses committed by her colleague [V.P.] and which she has endorsed, Lumeajustiţiei.ro has summarised certain passages [written] by the judges who have confirmed the acquittal [verdict] in decision no. 158 of 16 December 2008 of the Bacău Court of Appeal. We [should] mention that these passages have also been included in the request made to [the] CSM [asking] for an answer from [O.S.H.]:

- The hearing of the minor [C.Z.], to whom he told what to write, by using insults and threats of prison time ... He was a minor, and given the circumstances, the investigator did not ever ask him to attend the hearings accompanied by one of his parents. Instead of [C.Z.]'s parents, the initial statement was co-signed by an attesting witness [(*martor asistent*)] who could not be identified;

- The expert report by C.N., who was not an expert in the field. The prosecutor [V.P.] discarded the expert report produced by the [I.] ... Laboratory by holding that the [report] produced by C.N. was the lawfully adduced evidence and contained the correct content because it confirmed the impact between the vehicles, a statement which was completely false as established the Bacău County Court itself, but also the Bacău Court of Appeal [which] in the reasons for the judgment no. 158 of 16 December 2008 emphasised that: 'the statement in the act of indictment that this expert report confirmed the impact between the two vehicles ... was false, given that traces were found on the back bumper and not on the left-hand side of the front bumper of the BMW, as would have been the case if it had hit the Dacia driven by the victim';

- [N.T.]'s request for a new expert report to be produced at the criminal investigation stage [of the proceedings], which was rejected by the [prosecutor's] order [...], but also the dismissal [of the request for a] confrontation with the minor witness [C.Z.], who afterwards retracted his statement.

The conclusion of [N.T.]'s innocence could already have been reached at the criminal investigation stage [of the proceedings], if [O.S.H.] had checked and disputed [(*infirmat*)] prosecutor [V.P.]'s abuses.

Because of the two prosecutors, [O.S.H.] and [V.P.], the 32-year-old N.T. from Bucharest, a graduate of Bucharest ... University, remained in detention for 13 months (charged with having intentionally crashed [his car] into the car of his girlfriend's ex-boyfriend out of jealousy, the [latter] having lost control of his car following the impact and plunged into a river). After years of trials, [N.T.] was acquitted at first instance ... [because] the offence was committed by a different person. The prosecutor's office's appeal and appeal on points of law were dismissed as ill-founded, [and] thus the acquittal judgment of the judges of the Bacău County Court was upheld. On 3 May 2012, because of the 'suffering caused by the unlawful detention', [N.T.], the victim of this miscarriage of justice, lodged a complaint with the General Prosecutor's Office against the two prosecutors, registered under [number] 8386, hoping for justice to be served. In his opinion both the ... [vice-president] of the CSM [O.S.H.] and the prosecutor who had investigated the case [V.P.] were guilty 'of actions that had clearly breached his rights conferred by criminal procedure norms as well as his fundamental right to a defence. Instead of the conclusion [of his innocence] being already reached at the criminal investigation stage [of the proceedings], the confirmation of the act of indictment made [it] possible [for his] indictment [to be filed] and [for] another considerable amount of time to elapse until **[**he**]** was able to prove his innocence'.

Judgment no. 158 of the Bacău Court of Appeal [stated]: 'If evidence does not exist, and doubt still persists with regard to [the existence of] guilt, then doubt is "the equivalent of a positive proof of innocence" and therefore the defendant must be acquitted.'

This is how the judges of the Bacău Court of Appeal reasoned decision no. 158 of 16 December 2008, in which they decided to dismiss as ill-founded the appeal of the prosecutor's office, upholding the judgment of the first-instance court ... : 'The witness C.Z. did not maintain the statements [given] at the criminal investigation [stage of the proceedings] before the court, stating that he had been insulted and threatened by the prosecutor, that his mother had not been present when [he had made] his first statement,

and that his second statement had been likewise taken in the absence of his mother, who had been brought [in] to sign [it] after [it was taken]. The witness stated before the court that he had not seen the "Dacia" before it had fallen into the river, that he had heard a thump, that he had not seen anything else, and that the distance between the bar and the bridge had been 300 metres.

He also stated that his statement before the court had been the same as the one given during his interview ... [at the scene], but the prosecutor had told him what to write in his statement. When examining witness [C.Z.]'s statements, the first-instance court noted that the statement which was made before the court represented the truth, given his statement [at the scene] which corroborated his filmed statement ... from which it can be seen that the witness did not state that he had seen the BMW car hit the "Dacia" driven by the victim [O.L.] ...

Two expert reports were produced at the criminal investigation [stage of the proceedings]. The first produced by the [I. ...] Laboratory concluded that the BMW ... car had a single trace of dynamic friction on the rubber band of the left-hand side of the back bumper, whilst on the "Dacia's" ... body the traces of an impact were identified on the right-hand side of the back [of the car] ... [The court] notes that the traces identified on the BMW ... car ... were not created by physical contact between this [car] and the Dacia car, and the infrared spectrometric analysis of a piece of the Dacia's back spoiler from the area presenting the traces of an impact had not revealed the presence of material from which the BMW's car's rubber band on the front bumper was made. The statement in the act of indictment that this expert report confirmed the impact between the two vehicles because traces of friction could be found on the BMW car was false, given that the traces in question had been found on the back and not the front left bumper of the BMW, as would have been the case if it had hit the Dacia driven by the victim. The second expert report produced during the criminal investigation [stage of the proceedings], the only one incriminating the defendant, was produced by a specialist engineer, [C.N.], and not by an authorised expert ... and the prosecutor has not relied on any special reasons [explaining] why he had been forced to use this specialist and not authorised experts.

In these circumstances, the court cannot rely on the conclusions of this expert report. Because of the blatant contradictions between the two expert reports ... other forensic expert reports had been ordered [in the case] with the aim of establishing the dynamics of the accident [and] whether there was any physical contact between the two vehicles ... The expert report[s] concluded that it could not be said that there was contact between the two vehicles before the traffic incident happened [and] it could not be established whether the crash into the Dacia car could have caused the impact with the barrier and the fall into the ... river, [because] the time [when] and the place where ... [O.L.] lost control ... and the extent of the manoeuvres performed by the Dacia car's driver were unknown ... Given that the three expert reports produced in the case ... could not establish the existence of an impact between the two vehicles ... and that the testimonial evidence was partly contradictory, the court finds that the defendant's guilt was not established beyond reasonable doubt. Given that in delivering a guilty verdict the court must base its conviction about a defendant's guilt on certain and clear evidence and that in the [present] case the evidence against [the defendant] is not certain, decisive or is incomplete, leaving room for doubt about the defendant's guilt, the first-instance court has correctly applied the *in dubio pro reo* ... principle.

...The *in dubio pro reo* principle is a matter of fact before it becomes a matter of law ... And [if] the doubt still persists with regard to [the existence of] guilt, even though [as a matter of] fact evidence was adduced in support of prosecution, and other evidence

could not be envisaged or it simply did not exist, then the doubt is "the equivalent of a positive proof of innocence" and therefore the defendant must be acquitted.'

Why is [O.S.H.] not responding? How can litigants still believe that CSM will deliver justice in those cases where certain [officers of the court – (*magistraţi*)] break the law, when a CSM manager is silent in the face of such a story?

Lumeajustiţiei.ro has been waiting for four days for the response of the CSM vice-president [O.S.H.] who is in the office and [is] not on leave. It should be mentioned that the CSM spokesperson, [M.P.], is on leave, but she has indicated [as follows] that she has sent the request directly to [O.S.H.]: 'I have sent your request to the CSM vice-president, [O.S.H], and the response will be communicated to you through the Press Department'."

28. The article included an attachment of the Bacău Court of Appeal's judgment of 16 December 2008 (see paragraph 19 above), a photograph of O.S.H. set against the background of a CSM meeting, and a photograph of the first page of the act of indictment concerning N.T., showing that the superior prosecutor attached to the Bacău Prosecutor's Office, O.S.H., had signed the act of indictment and endorsed it.

29. On 4, 9, 15, and 31 January 2013, four more articles were published in the publication *Lumea Justiţiei* concerning the same events, namely the N.T. case. All of these four articles were published in the context of O.S.H.'s election as president of the CSM in January 2013. Only the article of 9 January 2013 was written by the first two applicants.

III. PROCEEDINGS AGAINST THE APPLICANTS

A. O.S.H.'s submissions

30. On 1 March 2013 O.S.H. brought general tort law proceedings against the applicants seeking 60,000 euros (EUR) in respect of non-pecuniary damage, the publication of the court's judgment at the applicants' expense in three national newspapers specified by her and in the publication *Lumea Justiţiei*, and costs and expenses. She argued that *Lumea Justiţiei* had organised a defamatory press campaign against her consisting of thirty-six articles which had breached her rights to respect for reputation, image, and honour and had sought to affect the image and credibility of the CSM. From 2 August 2012 to 25 February 2013 the applicants had written, published, and maintained the articles in question on the online platform *Lumea Justiţiei*, including the articles mentioned in paragraphs 26-29 above, which had disseminated untruthful, unproven, and distorted information, and had exceeded the limits of journalistic freedom of expression.

31. O.S.H. argued further that the statements and accusations in the articles had been even more serious given that the publication portrayed itself as a good source of information on matters concerning the justice system. According to the presentation on its website, the publication was the most

read website so far as this topic was concerned, which meant that the public considered the information provided by it to be credible.

32. The information conveyed to the public about the N.T. case had not correctly presented the procedure applicable in criminal cases because the publication had sought to present accusations which served its own personal interests. O.S.H. stated that she had clarified matters by responding to those accusations in an interview with the R. media outlet.

33. In that interview she had stated that she had not been the prosecutor investigating the case. Moreover, in her role as superior prosecutor she had had to check in accordance with Article 264 of the Code of Criminal Procedure whether the indictment was lawful and well founded. That meant that she had had to see whether the criminal procedure had been followed and whether the charges brought were supported by the evidence. She stated further that she had checked whether the evidence was lawful and well founded, and that at the time when she had conducted her review, the evidence had supported the charges that had been brought against N.T. Furthermore, it was the case prosecutor, and not her, who had asked the court to detain N.T. pending trial, and the court had granted that request because it had considered that there was sufficient evidence that N.T. had committed the offence.

34. In the same vein of untruthful accusations, the articles in the publication had portrayed her as someone who had pressured and misused the anti-corruption institutions in the country. In addition, the applicants had induced the public to believe that she had had ties to the country's President, T.B., in a context in which the public had been very sensitive to information about the influence that certain State institutions could have had on the CSM's activities. The fact that that information had been circulated publicly even on the day of her election as CSM president was proof of the ill-intent behind the applicants' actions, given that it was a tense (*tensionat*) situation, and that her election had been widely debated by the media.

35. The first two applicants had also endorsed the slanderous campaign organised by the publication during their appearances on shows broadcast by the A.3 television station.

36. Lastly, O.S.H. argued that the applicants had a duty as journalists to present information to the public correctly and not in accordance with their own personal interests or views because of the role of the CSM as the guarantor of the independence of the justice system. The Report from the European Commission to the European Parliament and the Council on progress in Romania under the Cooperation and Verification Mechanism of 30 January 2013 had emphasised that it was important for journalists to comply with that duty.

37. However, the facts of her case had shown a serious violation of the legal, constitutional and ethical provisions applicable to those responsible for disseminating information.

B. The applicants' submissions and counterclaim

38. The applicants argued before the court, *inter alia*, that O.S.H.'s court action was a settling of scores and an attempt to silence them because she refused to accept that she could not be immune from criticism by the media. They contended that from 2010 to the spring of 2012, the first two applicants had had repeated contact with O.S.H., and that *Lumea Justiţiei* had published several positive articles about her and her projects which had helped her become first a CSM member and then a vice-president of that institution in January 2012. Nevertheless, O.S.H. had started behaving aggressively towards the publication, and also other journalists, after articles it had published in the spring and early summer of 2012 had criticised, *inter alia*, some of the benefits granted by the authorities to CSM members and its management, and the misuse of some of those benefits by O.S.H. and another CSM manager.

39. The second applicant and the applicant company also brought a counterclaim against O.S.H. seeking non-pecuniary damages because in a press article published on 26 July 2013 O.S.H. had stated that for approximately the last ten months she had been subjected to a media lynching which had sought to intimidate her and prevent her from doing her job. She had also stated that this had been done by the I. Group, who were using a website whose stories were then reproduced by the A.3 television station. O.S.H. had further stated that she had brought court proceedings against the S.Z. website, the I. Group and one other website that had been used for those acts. The applicants were of the opinion that the latter unnamed website that O.S.H. was referring to was *Lumea Justiţiei*.

C. The first-instance court's judgment

40. On 30 October 2014 the Bucharest County Court allowed O.S.H.'s action in part (see paragraph 30 above) and ordered the applicants to pay her EUR 5,000 in respect of non-pecuniary damage, and to publish the operative part of the judgment at their expense in the publication *Lumea Justiţiei*. In addition, the court allowed in part O.S.H.'s claim in respect of costs and expenses. The court dismissed the counterclaim brought by the second applicant and the applicant company (see paragraph 39 above) against O.S.H.

41. Relying on the relevant national and international norms, as well as the principles set out in the Court's case-law concerning the criteria that need to be taken into account when balancing the right to freedom of expression against the right to private life, the court held that the publication had covered the CSM's activities because it had an editorial profile focused on the justice system. The CSM was presided over by O.S.H. and, even though it received media attention in general, it had received special attention since the summer

of 2012 because of in-house conflicts and the position of certain officers of the court.

42. The articles had concerned O.S.H.'s behaviour as prosecutor and CSM president, as well as matters connected to the manner in which the CSM had operated and interacted with other State institutions, including the country's President. The articles had therefore debated matters of public interest, namely the manner in which the justice system worked and the moral probity of those called to protect it, and had concerned O.S.H., a public person and a high-ranking official. O.S.H. had received attention from the press before, given that *Lumea Justiţiei* had also published numerous articles favourable to her.

43. The court held that the articles had consisted mostly of value judgments written in a journalistic fashion which had been supported by a sufficient factual basis.

44. The court held, however, that the five articles concerning O.S.H.'s behaviour as prosecutor in the N.T. case had to be distinguished from all the other articles in dispute. While the journalistic style and content of the latter had remained within the limits of the protection afforded by Article 10 of the Convention, the same thing could not have been said about the former. Those articles were capable of raising doubts about O.S.H.'s professional integrity in the mind of a reasonable, well-intentioned, disinterested, and informed observer, thus exceeding the limits of expression, mindful of the duty of discretion.

45. The circumstances of the articles concerning the N.T. case were very specific because the applicants had presented the circumstances of that case, published the act of indictment, referred to the judgment of acquittal, and accused O.S.H. of having committed a miscarriage of justice. It was understandable that they had publicised the N.T. case in order to inform readers about O.S.H.'s professional integrity, given the context of the elections for CSM president and the existence of a sufficient factual basis. Moreover, according to one of the articles O.S.H. was given a chance to respond.

46. Nevertheless, the applicants had expressed value judgments in an excessive, unnecessarily offensive and ill-intentioned manner. The expressions and terminology used had portrayed O.S.H. as a prosecutor who had acted unlawfully by sending N.T. to prison, and this put the public in an emotional state of mind. It was true that the N.T. case had regrettably followed a certain path, and that the applicants had had a justification for publicising O.S.H.'s involvement in the case. However, this information could have been conveyed to the public in a fair manner that would have allowed the public to form its own opinion about O.S.H.'s behaviour.

47. Even in the case of value judgments, freedom of expression had limits and those limits were closely connected to a journalist's good faith. Identifying the limits of a journalist's right to provoke and exaggerate was a

delicate exercise because even the European Court of Human Rights' approach when classifying certain journalistic language as acceptable or not appeared to be fluid. This was especially true given that the media had, on the one hand, the power to impart information and to suggest how it should be perceived and, on the other hand, the duty to not distort truthful and impartial information.

48. The court accepted O.S.H.'s arguments that the articles in question referred to both prosecutors (herself and V.P.) as being responsible for a miscarriage of justice, and that none of the articles had presented clearly to the public her responsibilities and her legal authority as a superior prosecutor. The court held that it could not ignore the fact that the applicants were familiar with the field because they published articles covering the legal field, and should have been aware of the limits of a superior prosecutor's involvement in confirming an act of indictment and of the fact that his or her legal authority did not cover pre-trial detention.

49. The excessive tone of the criticism directed at O.S.H. was unacceptable given that as a superior prosecutor, O.S.H. had not investigated the case directly and had not interviewed witnesses personally, and a judge had assessed the evidence and had decided that N.T.'s pre-trial detention had been justified. The acquittal judgment published by the applicants could not support their argument that they had acted in good faith either. According to the judgment in question, N.T.'s acquittal had relied on the fact that some of the witnesses had changed their statements given at the criminal investigation stage of the proceedings and the fact that the available evidence had been insufficient to support a conviction.

50. The court emphasised that the articles had used words which had an impact on public opinion – such as "she has the destruction of an art student's life on her conscience", "remained in detention for 13 months while innocent, because of the prosecutors [V.P.] and [O.S.H.]", "these are the human dramas caused by the [officers of the court] who do not know what they are doing or who are ill-intentioned", or "despite this 'miscarriage of justice' [O.S.H.] was promoted staggeringly fast, being seconded for many years to governmental institutions, and recently ascending to become, from CSM vice-president, the first CSM president who had been a prosecutor. How can a person like that manage the Romanian justice system at its highest level? How can such a person judge the disciplinary actions concerning the errors of her other colleagues? We will let you decide how a person who has destroyed the destiny of an innocent young man can cling to the highest position in CSM, knowing the disaster she has left behind ...". This had gone beyond mere value judgments and had emphasised the applicants' bad faith, as they were familiar with the circumstances of the publicised case. Such bad faith was also illustrated by the articles' reference to prosecutors who had influenced witnesses. That reference concerned O.S.H. directly as the perpetrator of the

miscarriage of justice, even though she had not been the one interviewing the witnesses.

51. The articles concerning the N.T. case suggested an intention to defame O.S.H. because they had accused her directly of having committed a miscarriage of justice, questioned her professional abilities and not left room for doubt, and the information had been presented incorrectly and with bias.

52. Even though they had included official documents concerning the N.T. case, and had relied on a sufficient factual basis, by blaming O.S.H. for breaking the law and failing in her professional duties, the articles had not been sufficiently reserved in their statements so as to make the information presented to the public sufficiently precise. Thus, the applicants had affected not only O.S.H.'s reputation, but had also undermined the public's trust in the integrity of officers of the court in general.

53. The applicants were jointly liable for the damage caused to O.S.H. because the first two applicants were the authors of the articles and the applicant company was the editor of the online publication which had published them. In accordance with the relevant domestic law, the owner of an internet site was liable for publishing offensive comments made by other persons on his or her site. A lawsuit could be brought either against the editor alone, or against both the editor and the actual author of the offending article.

54. Lastly, in calculating the amount of compensation awarded to O.S.H. for non-pecuniary damage, the court took into account the Court's case-law and the fact that even though the articles had affected O.S.H.'s image, they had not affected her professional activity.

55. The court held that the counterclaim brought by the second applicant and the applicant company was inadmissible because the statements in question made by O.S.H. had concerned other natural and legal persons, and in any event had not had any close connection with the proceedings brought by O.S.H. against the applicants. The claim brought by the second applicant and the applicant company had in fact constituted a separate court action with a distinct analysis and set of evidence, that they could have brought against O.S.H separately.

D. The applicants' and O.S.H.'s appeals

1. The applicants' appeal

56. The applicants appealed against the judgment. They argued that as far as the articles concerning the N.T. case were concerned, the judgment had been contradictory and the first-instance court had redefined the concept of value judgments as illustrated in the Court's case-law. The value judgments and rhetorical questions identified by the first-instance court to be problematic (see paragraph 50 above) had been supported by a sufficient and accurate factual basis, which had allowed the public to form its own opinion. Punishing the applicants for these expressions and questions had been an

excessive and unjustified restriction on freedom of expression. In any event, all the expressions censored by the court had represented the lead-up to the articles and could therefore have included a greater amount of permissible exaggeration.

57. From 2 August 2012 onwards, the publication had given O.S.H. the opportunity to express her views on the N.T. case. Even though she had not responded, on 15 January 2013 *Lumea Justiției* had published her opinion on the duties and legal authority of a superior prosecutor, that she had expressed during the interview with the R. media outlet (see paragraphs 32-33 above). That opinion had confirmed the value judgments expressed in the articles to the effect that O.S.H. had been under a duty to review whether the under-age witness C.Z. had been assisted or represented at the time of his interview with the prosecutor or whether the expert report in the case had been produced by an authorised expert.

58. The applicants argued further that the compensation for non-pecuniary damage awarded to O.S.H. had been disproportionately high given that O.S.H. had been given the opportunity to react to the information in the articles but had chosen to remain silent, that the articles had relied on a sufficient factual basis, and that the lower court had acknowledged that O.S.H.'s professional activity had not been affected (see paragraph 54 above).

2. O.S.H.'s appeal

59. In her appeal O.S.H. argued, *inter alia*, that the systematic repetition of the accusation concerning the arrest of an innocent person was a concrete and very serious accusation, underlying the applicants' clear and unlawful intention of portraying her as an incompetent person who was clearly unfit to be CSM president. This was even more the case given that the applicants were very familiar with the national justice system, the applicable legal provisions, and the question of who had jurisdiction to order or decide on a person's arrest.

60. The court had to take into account the fact that the publication's readers, or an important part thereof, did not have a law degree or the necessary training to allow them to understand the contents of the criminal law judgment which the applicant had mispresented or to determine that O.S.H. had not had any procedural jurisdiction to keep a person detained, even though she had been a superior prosecutor.

61. O.S.H. further argued that the applicants had not presented, in the articles concerning the N.T. case, either the evidence that had existed at the time when she had reviewed the act of indictment, namely the statements of all those involved in the events in question and the expert reports produced in the case, nor the essential procedural elements that would have allowed the public to understand that O.S.H. had not been the prosecutor investigating the case, and that in accordance with the relevant legal provisions a person's

detention could have been ordered only by a court. The applicable legislation stated that a prosecutor was independent under the conditions provided for by law in terms of the measures ordered (*dispuse*). The prosecutor could challenge before the CSM a superior prosecutor's intervention made in any form with regard to the carrying out of a criminal investigation or the adoption of a solution. O.S.H. reiterated (see paragraph 33 above) that her review of the act of indictment in the N.T. case had concerned the lawfulness and the well-founded nature of the criminal investigation acts carried out by the prosecutor in the case, without her being able to intervene in the solutions ordered by the prosecutor during the criminal investigation. She could therefore certainly not have ordered N.T.'s pre-trial detention as argued by the applicants.

E. The last-instance court's judgment

62. By a final judgment of 17 June 2015 (available to the applicants on 23 October 2015), the Bucharest Court of Appeal ("the Court of Appeal") allowed the applicants' appeal and changed the lower court's judgment in part. It ordered the applicants to pay EUR 1,000 to O.S.H. in respect of non-pecuniary damage and higher compensation in respect of costs and expenses (notably, 3,370 Romanian lei (RON), equivalent to EUR 762), and upheld the remainder of the lower court's judgment.

63. The Court of Appeal held that only part of the five articles concerning the N.T. case had been written by the first two applicants themselves. However, all the articles in question had been edited by the applicants. They had therefore accepted responsibility and had been liable for them.

64. The court held further that the applicants could not be held responsible for the four articles published between 4 and 31 January 2013 (see paragraph 29 above) because those articles had relied on a sufficient factual basis and the applicants had acted in good faith. The court accepted the applicants' argument that the expressions and the questions found by the first-instance court to be problematic in those articles (see paragraph 50 above) had remained within the limits of journalistic freedom of expression. Also, the accusation that O.S.H. had indicted an innocent person was supported by a sufficient factual basis, given that O.S.H. had confirmed the indictment of a person who was detained for thirteen months pending trial and was subsequently acquitted by the courts.

65. The fact that the applicants had wrongly portrayed O.S.H. as the person responsible for N.T.'s erroneous indictment and detention pending trial was not sufficient on its own to prove their bad faith and intention to defame her. In spite of their law degrees, the applicants' erroneous assessment could have very probably been the result of a rather basic understanding of the legal norms regulating the duties and responsibilities of the prosecutors involved in criminal proceedings, given that they had done

their research and had read and reproduced the court judgment acquitting N.T.

66. The court held, however, that the article of 2 August 2012 (see paragraphs 26-28 above) had overstepped the limits of freedom of expression because it had relied on the text of the judgment acquitting N.T. to make a specific accusation against O.S.H., even though the text of the judgment in question had not supported such an accusation. The article first clearly affirmed the existence of abuses by the prosecution, noted by the judges in the case. The first paragraph of the article then described these abuses by quoting the title of another article published by the publication in July 2012, which had stated among other things that the judges had noted the pressure put by the prosecutors on the witnesses.

67. Consequently, by using the expressions "Find out [about] the prosecution's abuses, noted by the judges in this case!" and "The judges noted the pressure [put] by the prosecutors on [the] witnesses", the August 2012 article stated in effect that the judges had noted that the miscarriage of justice of accusing an innocent person of murder had been the result of the abuses committed by the case prosecutor and O.S.H., which had consisted in the pressure put by the two prosecutors on the witnesses.

68. The court held that such an accusation was false. When presenting the information to the public, the applicants had not been acting in good faith because they had misrepresented the information available in the judgment of acquittal. In this latter judgment the court had noted that when it had heard C.Z., the witness had not maintained his statements given at the criminal investigation stage of the proceeding because he had stated that he had been insulted and threatened by the prosecutor. The fact that the court which acquitted N.T. reproduced the witness's reasons for changing his statements had not meant that that court had itself considered that such pressure had existed or that the reasons given by the witness had been true. The probative value of C.Z.'s statement had been examined against the background of other evidence and the court had given force to the *in dubio pro reo* principle because it had continued to doubt that N.T. was guilty.

69. The court held further that O.S.H. had not been responsible for interviewing witnesses in her position as superior prosecutor, and not even C.Z. himself had suggested that she had committed an abuse against him, given that he had referred only to the case prosecutor V.P.

70. The article had made clear and specific accusations against O.S.H. that had gone beyond mere value judgments and had exceeded the limits of acceptable criticism. By clearly asserting, with bad intentions, that she had committed an abuse when performing her professional duties, the article had been drafted in a manner going beyond mere criticism of O.S.H.'s morals and professionalism. It had therefore distorted reality and intentionally defamed her.

71. The fact that the applicants had given O.S.H. the opportunity to react to the information presented in the article could not mend or repair the damage caused by the statement made therein.

72. Lastly, when calculating the amount of compensation for non-pecuniary damage awarded to O.S.H., the court took into account only those statements in the article that had been found to be detrimental to O.S.H.'s professional reputation, the principles set out in the Court's case-law on the chilling effect that severe penalties could have on the press when reporting on issues of public interest, and the impact of the press on the general public.

IV. OTHER RELEVANT INFORMATION

73. On 21 March 2013, following a complaint by O.S.H., the CSM held that the statements that had been made about her professional integrity and training during a television show of 6 January 2013 which had reviewed the measures she had taken in the N.T. case had affected prosecutor O.S.H.'s independence, impartiality and professional integrity. That was even more the case considering that she was the CSM president.

74. The finding of the CSM was in reaction to the following statements, made by a moderator during the television show against the background of images of O.S.H. and of the act of indictment in the N.T. case:

> "... One may be incompetent ... But what happens to someone who is so incompetent that [he or she] puts a young architect in jail for 13 months, in pre-trial detention, for murder, with criminals? [He or she] could never work again ... no? [He or she] could at least be punished ... Look at the documents, ladies and gentlemen! This lady ... [O.S.H.] makes a serious judicial error. N.T. was ... indicted for aggravated murder, but all the courts ... have found him innocent. The case was sent to trial under the signature of the ... [superior] prosecutor [O.S.H.]. The victim of the prosecutor [O.S.H.]'s error, N.T., even now seeks pecuniary and non-pecuniary compensation ... Complaints to the CSM, where ... [O.S.H.] was [the] vice-president, have received no response ... They say that those who have committed abuses cannot ascend to office ... but I see that ... [O.S.H.] has become CSM president ... It is presumed that ... this professional [organisation] ... [includes] the most intelligent, upstanding, and irreproachable people who can make decisions with regard to the complaints brought by citizens and which ... may target ladies such as ... [O.S.H.]. How can ... [O.S.H. decide after] the absurd actions she carried out when she was a ... [superior] prosecutor in Bacău? ..."

75. The CSM held that in the N.T. case the criminal investigation had been conducted by the case prosecutor who had also drafted the proposal for N.T. to be placed in pre-trial detention. This proposal had been accepted by a judge, the only person who had jurisdiction to decide on N.T.'s detention. In accordance with section 64(2) of Law no. 304/2004 on the organisation of the judiciary, O.S.H.'s review of the act of indictment had concerned the lawfulness and well-foundedness of the criminal investigation acts carried out by the prosecutor in the case, without her being able to intervene in the solutions ordered by him during the criminal investigation.

76. The CSM held further that the impugned statements had exceeded the acceptable limits of freedom of expression, which was subject to limitations when it was used against certain values such as the authority and impartiality of the judiciary. National and international law recognised the prosecutors' independence and impartiality and the need for that independence and impartiality to be protected. By clearly distorting the factual realities concerning the prosecutor and the prosecutor's independence and impartiality, the statements in question had indirectly induced the idea that the justice system had functioned incorrectly. Statements that questioned the impartiality of prosecutors could undermine the public's confidence in prosecutors and could in turn affect their ability to adequately perform their duties.

77. On 21 February 2020 the CSM informed the Government that the above-mentioned complaint (see paragraph 73) had not concerned the article of 2 August 2012 (see paragraphs 26-28 above).

RELEVANT LEGAL FRAMEWORK AND INTERNATIONAL MATERIAL

78. The Romanian Civil Code provides that a person with discernment is liable for all damage caused by his actions or inactions and is bound to make full reparation (Article 1349; see *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 70, 25 June 2019).

79. The relevant provisions of the national legal framework and the international material concerning the appointment, functions and independence of prosecutors, and their right to freedom of expression are set out in *Kövesi v. Romania* (no. 3594/19, §§ 71-93, 5 May 2020).

80. The Report from the Commission to the European Parliament and the Council on progress in Romania under the Cooperation and Verification Mechanism of 30 January 2013 states as follows in its relevant parts:

> "...
>
> One of the major concerns over the summer was the clear evidence of pressure on judicial institutions and lack of respect for the independence of the judiciary. This remains a major source of concern. The Commission received numerous reports of intimidation or harassment against individuals working in key judicial and anti-corruption institutions, including personal threats against judges and their families, and media campaigns amounting to harassment (for example the allegations of pressure and intimidation of judges of the Constitutional Court which have been brought to the attention of the Commission. Letter from President Barroso to Romanian Prime Minister Victor Ponta of 10/08/2012).
>
> Unfortunately, the Commission's recommendation has not been fully implemented. Politically motivated attacks on the judiciary have not ended ...
>
> The Commission would also like to draw attention to the role of the media. There have been numerous examples of the media exercising pressure on the judiciary, as well as particular doubts whether the National Audiovisual Council is proving an effective

watchdog. The situation suggests the need for a review of existing rules, to ensure that freedom of the press is accompanied by a proper protection of institutions and of individuals' fundamental rights as well as to provide for effective redress.

...

The Commission welcomes the positive steps taken ... but considers that much remains to be done to fully implement its recommendations.

...

Review existing standards to safeguard a free and pluralist media while ensuring effective redress against violation of individuals' fundamental rights and against undue pressure or intimidation from the media against the judiciary and anti-corruption institutions. The National Audiovisual Council should be assured of its effective independence and play fully its role by establishing and enforcing a Code of Conduct in this regard.

..."

81. The European Commission 2021 Rule of Law Report: Country Chapter on the rule of law situation in Romania states as follows in its relevant parts:

"...

Lawsuits for defamation against investigative journalists continue to be reported. Two recent alerts on the Council of Europe Platform for the protection of journalism and safety of journalists concern harassment and intimidation of journalists. Another lawsuit for defamation against investigative journalists, concerning articles on the global football industry, has been dismissed by the relevant Romanian court in early 2021. In a recent judgment, following a lawsuit for defamation filed by the mayor of a Bucharest district against a major newspaper, the court of first instance decided the removal of several articles published by that newspaper. It is reported that the mayor has also filed a criminal complaint, investigated by the Directorate for Investigating Organized Crime and Terrorism, against journalists from several publications for constituting an organised criminal group as well as for extortion. Civil society further reported cases of SLAPP (strategic lawsuit against public participation) against journalists, media or civil society by public institutions or businesspersons.

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

82. The applicants complained that the sentence imposed on them had interfered with their right to freedom of expression, had not been justified by a pressing social need and had aimed at intimidating them. They relied on 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. Admissibility

83. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicants

84. The applicants argued that the measure imposed on them was an interference with their right to freedom of expression. They acknowledged that the measure was lawful and pursued the legitimate aim of protecting O.S.H.'s reputation.

85. They contested, however, the Government's argument that the impugned measure had also sought to protect the image of the judiciary. This image could not be based on abuses or the suffering of victims of the legal system. Public confidence in the system could be forged only by upholding the truth and punishing those responsible for miscarriages of justice, not by punishing journalists who published information about such judicial errors.

86. The applicants argued further that the measure imposed on them had not been necessary in a democratic society. The article had concerned only O.S.H.'s professional activities, had not contained any offensive language or personal attacks, and had touched on questions of public interest in the context of an election.

87. O.S.H. was not an actively working officer of the court at the time when the article was published. She was a member and vice-president of the CSM and, according to publicly available information, she was preparing to run for the post of CSM president, which she eventually won. She was therefore a politician within the legal system and an elected public official, since the CSM embodied all of the characteristics of a parliament and government for officers of the court and its members, and managers ran in campaigns and were elected by other officers of the court or CSM members.

88. Unlike an actively working officer of the court, therefore, but just like a politician, O.S.H. had exposed herself consciously and voluntarily to close public scrutiny of her activities, and therefore had to show a higher tolerance to criticism.

89. The applicants contested the Government's submission and the Court of Appeal's assessment that the judges who had acquitted N.T. had not noted the abuses committed by the prosecutor's office or the fact that the witnesses had been pressured by the prosecutor. The judgment in question had clearly noted that C.Z.'s testimony was taken in the absence of an attesting witness and of the defence lawyer who had expressly asked to be present; that C.Z. had stated that he had been threatened by the prosecutor; that the first-instance court which had acquitted N.T. had held that C.Z.'s statement at the criminal investigation stage of the proceedings was suggested to him and that his statement before the court was true; that one of N.T.'s alleged victims had stated before the court that the case prosecutor had written down her statement incorrectly; that one expert report produced in the case at the investigation stage of the proceedings was invalid because it had not been produced by an authorised expert; and that the act of indictment had falsely stated that the other expert report produced at the investigation stage of the proceedings had proven N.T.'s guilt.

90. By expressly acknowledging that C.Z. was sincere in his statements before the court, the first-instance court which acquitted N.T. had clearly considered that the testimony of the witness was true, including his statement about being threatened by the prosecutor.

91. The applicants acknowledged that some of the unlawful acts committed by the case prosecutor and identified by the first-instance court examining the N.T. case could not have been known by O.S.H. in her capacity as superior prosecutor because she had not conducted the actual investigation herself. However, many of these acts should have been known and invalidated by O.S.H., including the fact that C.Z. was interviewed without an attesting witness or the defence lawyer being present, that one of the expert reports was not produced by an authorised expert, and that the case prosecutor's assertion about N.T.'s guilt having been proven by one of the expert reports was false.

92. The article had criticised both O.S.H. and V.P. for abuses committed in the N.T. case. It was clear from the text of the judgment in that case that each of the two prosecutors had committed their own unlawful acts, because the judges had noted that the prosecutor's office had put pressure on witnesses. As a result, the journalist who had written the article had made the immediate and logical value judgment that the abuses committed by the prosecution had been noted by the judges.

93. The applicants argued that the civil sanction imposed on them for statements of fact and value judgments made in good faith and which had been supported by a sufficient factual basis, could not have been justified by any pressing social need. This had been even more so considering that O.S.H. was given an opportunity to respond and had refused to do so; that the readers of the publications had mostly been trained legal professionals capable of distinguishing between the tasks of prosecutors involved in a case and of

reading the full text of the judgment acquitting N.T. attached to the article; and that the publication had published O.S.H.'s position on the issues mentioned in the article, which she had expressed via a different media outlet (see paragraphs 32-33 and 57 above).

94. Lastly, the applicants contended that the CSM's decision of 21 March 2013 (see paragraphs 73-76 above) had not had any connection to the applicants' case. That decision had concerned statements that were substantively different from the ones in the article, had been made during a television show, had not had any connection to the applicants' editorial activities and had not touched on the article of 2 August 2012.

(b) The Government

95. The Government acknowledged that the measure imposed on the applicants could be viewed as an interference with their right to freedom of expression.

96. Nevertheless, the measure was lawful and sought to protect and preserve the reputation and the moral and professional integrity of an officer of the court and representative of judicial power, as well as the public's confidence in the judiciary.

97. In addition, it was necessary in a democratic society given that, as also indicated by the national courts, the press article in question had exceeded the limits of acceptable criticism because it had made specific accusations against O.S.H. concerning her professional conduct, by relying on the content of the judgments acquitting N.T. even though the content of those judgments had not supported those accusations.

98. It was true that matters concerning the administration of justice and officers of the court could be criticised publicly. However, such criticism could not exceed certain limits and the State was under an obligation to protect officers of the court against unjustified criticisms in order to preserve public confidence.

99. The expressions used and the statements made in the article had been more than simple value judgments and had ignored the rules on journalistic ethics. The manner in which the article was written, its context, the specific actions imputed to O.S.H., and the distorted presentation of reality, all pointed to an intention to compromise O.S.H., and to the applicants' bad faith.

100. Even though the applicants were not the actual authors of the article, they had taken responsibility and accepted liability for it. They had not provided proof of taking any serious steps to verify the information conveyed by the article, and the national courts had deemed the accusations the article had made against O.S.H to be false, after they had reviewed all the evidence adduced by the parties to the proceedings. A similar conclusion had also been reached by the CSM in its decision of 21 March 2013 (see paragraphs 73-76 above).

101. The Government contended that the national courts had provided ample and sufficient reasons for their decisions by relying on the relevant principles set out in the Court's case-law. In addition, the amount of civil damages awarded by the Court of Appeal to O.S.H. had been proportionate and had been justified in the circumstances of the case.

2. The Court's assessment

(a) Whether there was an interference

102. The Court notes that the parties agreed that the measure imposed on the applicants following the Court of Appeal's judgment of 17 June 2015 (see paragraphs 62-72 above) amounted to an interference with the applicants' right to freedom of expression as guaranteed by Article 10 § 1 of the Convention (see paragraphs 84 and 95 above). It sees no reason to hold otherwise.

103. The Government's arguments should therefore be examined in relation to the restrictions on freedom of expression provided for in paragraph 2 of Article 10. It must therefore be determined whether the interference was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2 and was "necessary in a democratic society" to achieve them (see, for example, *Balaskas v. Greece*, no. 73087/17, § 33, 5 November 2020).

(a) Prescribed by law and legitimate aim

104. The Court notes that the parties agreed that the measure was lawful and that it pursued the legitimate aim of protecting the reputation or rights of others, in particular O.S.H.'s professional reputation (see paragraphs 84 and 96 above). It sees no reason to hold otherwise.

105. The parties nevertheless disagreed as to whether the measure imposed on the applicants also pursued the legitimate aim of maintaining the authority of the judiciary (see paragraphs 85 and 96 above).

106. The Court reiterates that the phrase "authority of the judiciary" includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the resolution of legal disputes and for the determination of a person's guilt or innocence on a criminal charge; further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function. What is at stake is the confidence which the courts in a democratic society must inspire not only in the accused, as far as criminal proceedings are concerned, but also in the public at large (see *Morice v. France* [GC], no. 29369/10, §§ 129-30, ECHR 2015).

107. The Court notes that O.S.H. was a prosecutor at the time of the events in the N.T. case and that it seems that she maintained the same professional status even after her election as a CSM member and vice-president (see paragraph 73 above). It notes further that the status and functions of the

prosecution authorities differ from country to country and the question of whether they belong to the judiciary as such may accordingly have a different answer depending on the country concerned (see *Goryaynova v. Ukraine*, no. 41752/09, § 56, 8 October 2020).

108. Nonetheless, having regard to the role of prosecutors in Romania as described in paragraph 115 below, to the absence of a fundamental distinction being made by the national judicial system between the status of judges and prosecutors (see *Kövesi v. Romania*, no. 3594/19, §§ 124 and 208, 5 May 2020 and, *mutatis mutandis*, *Eminağaoğlu v. Turkey*, no. 76521/12, § 125, 9 March 2021), to the importance attached by the national authorities to the necessity of safeguarding the impartiality, the independence and the authority of prosecutors' decisions as a key element for preserving public confidence in the proper functioning of the justice system (see paragraphs 73-76 above), as well as to the position held by O.S.H. within the CSM and the functions attached thereto (see paragraph**s** 26 and 36 above), the Court considers that in the present case the measure in question could be seen as also pursuing the legitimate aim of maintaining the authority of the judiciary (see, *mutatis mutandis*, *Panioglu v. Romania*, no. 33794/14, § 108, 8 December 2020, in relation to judges, and *Eminağaoğlu*, cited above, § 131, in relation to prosecutors).

109. What remains to be determined is whether the interference was "necessary in a democratic society".

(b) Whether the interference was necessary in a democratic society

(i) General principles

110. The Court reiterates the general principles set out in its case-law for assessing the necessity of an interference with freedom of expression (see *Morice*, cited above, §§ 124-27; *Baka v. Hungary* [GC], no. 20261/12, §§ 158-61, 23 June 2016; and *Balaskas*, cited above, §§ 37-39, with further references).

111. In addition, the Court reiterates 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 and on an accurate factual basis and provide reliable and precise information in accordance with journalistic ethics (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I, and *Falter Zeitschriften GmbH v. Austria (no. 2)*, no. 3084/07, § 37, 18 September 2012). Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart, in a manner consistent with its obligations and responsibilities, information and ideas on all matters of public interest (see, among other authorities, *Erla Hlynsdóttir v. Iceland (no. 3)*, no. 54145/10, § 62, 2 June 2015).

112. Whilst it is true that editorial discretion is not unbounded, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Perna v. Italy* [GC], no. 48898/99, § 39 (a), ECHR 2003-V, and *Ahmet Hüsrev Altan v. Turkey*, no. 13252/17, § 214, 13 April 2021) and the methods of objective and balanced reporting may vary considerably; it is therefore not for this Court, nor for the national courts, to substitute its own views for those of the press as to what technique of reporting should be adopted (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298). Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III, and *Falter Zeitschriften GmbH*, cited above, § 38).

113. The Court reiterates further that questions concerning the functioning of the justice system, an institution that is essential for any democratic society, fall within the public interest (see *Morice*, cited above, § 128) and that there is no doubt that in a democratic society individuals are entitled to comment on and criticise the administration of justice and the officials involved in it (see *Lešník v. Slovakia*, no. 35640/97, § 55, ECHR 2003-IV). Nevertheless, regard must be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a State governed by the rule of law, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against gravely damaging attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying (see *Morice*, cited above, § 128, with further references).

114. Still – save in the case of gravely damaging attacks that are essentially unfounded – bearing in mind that judges form part of a fundamental institution of the State, they may as such be subject to personal criticism within the permissible limits, and not only in a theoretical and general manner. When acting in their official capacity they may thus be subject to wider limits of acceptable criticism than ordinary citizens (see *Morice*, cited above, § 131). This is especially true when a judge is occupying a very visible public office (see *Panioglu*, cited above, § 113).

115. Such considerations (see paragraphs 113-114 above) may also apply, *mutatis mutandis*, to public prosecutors in Romania; the Court has already acknowledged in relation to public prosecutors in general, irrespective of their specific status, that their task is to contribute to the proper administration of justice (see *Lešník*, cited above, § 54). That role imposes a duty on them to act as a guarantor of individual freedoms and the rule of law, through their contribution to the proper functioning of the justice system and thus to public confidence in that system (see *Eminağaoğlu*, cited above, § 133). Public prosecutors should therefore enjoy protection from offensive

and abusive verbal attacks and unfounded accusations (see *Lešník*, cited above §§ 53-54, and *Grebneva and Alisimchik v. Russia*, no. 8918/05, § 60, 22 November 2016).

116. This does not give them, however, immunity from any media criticism of actions performed in their official capacity. As public servants, they are subject to wider limits of acceptable criticism than private individuals, and suggesting otherwise would undermine the vital public watchdog role of the press (see *Novaya Gazeta and Milashina v. Russia*, no. 45083/06, § 61, 3 October 2017). Nevertheless, as in the case of other public servants, it cannot be said that public prosecutors knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to criticism of their actions (see *Nikula v. Finland*, no. 31611/96, §§ 48-50, ECHR 2002-II; *Lešník*, cited above, §§ 53-54; and *Chernysheva v. Russia* (dec.), no. 77062/01, 10 June 2004).

117. The Court reiterates that it has already had occasion to lay down the relevant principles which must guide its assessment in cases where it needs to balance a person's right to "respect for his or her private life" against the public interest in protecting freedom of expression (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 95-99, ECHR 2012, and *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 90-93, ECHR 2015 (extracts)). It has thus identified a number of criteria in the context of balancing the competing rights (see *Von Hannover (no. 2)*, cited above, §§ 109-13, and *Axel Springer AG*, cited above, §§ 90-95). The relevant criteria thus defined – in so far as they are pertinent in the instant case – include the contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, the way in which the information was obtained and its veracity, and the gravity of the penalty imposed on the journalists or publishers (see, *mutatis mutandis*, *Couderc and Hachette Filipacchi Associés*, cited above, § 93).

118. In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on (see *Axel Springer AG*, cited above, § 86). Where the balancing exercise between the rights protected by Articles 8 and 10 of the Convention has been undertaken 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 that of the domestic courts (ibid., §§ 87-88, with further references).

119. Lastly, the Court reiterates that a distinction needs to be made between statements of fact and value judgments. While the existence of facts

can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see *Mika v. Greece*, no. 10347/10, § 31, 19 December 2013). However, where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient "factual basis" for the impugned statement: if there is not, that value judgment may prove excessive. In order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks, bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact (see *Morice*, cited above, § 126).

(ii) Application of those principles in the instant case

120. The Court notes that, as recognised also by the national courts (see paragraphs 41 and 62 above), the present case concerns a conflict of concurring rights – on the one hand, respect for the applicants' right to freedom of expression, and on the other, O.S.H.'s right to respect for her private life – requiring an assessment in conformity with the principles laid down in the Court's relevant case-law. In particular, the article published by the applicants on 2 August 2012 (see paragraphs 26-28 above) referred to a case that O.S.H. had worked on when she was a superior prosecutor attached to the Bacău Prosecutor's Office, to some actions on her part taken in the above-mentioned case and to alleged abuses committed by the prosecution which were noted by judges in that case, and raised questions about the reasons behind her silence when faced with the story and about the possible undermining effect of her silence on the public's trust in the CSM's ability to punish officers of the court responsible for breaking the law.

121. The Court, examining the article's references and questions raised as a whole, considers that they were capable of tarnishing O.S.H.'s reputation and of causing her prejudice in both her professional and social environment. Accordingly, the accusations attained the requisite level of seriousness which could cause prejudice to the personal enjoyment, by O.S.H., of her rights under Article 8 of the Convention (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012).

(α) Contribution to a debate of public interest

122. The Court notes that the national courts have found that the applicants published the articles, including the article of 2 August 2012, in the context of a larger public debate concerning the organisation and functioning of the CSM, which generated special media attention for the organisation and its members from the summer of 2012, fuelled by the in-

house conflicts within the organisation and the position of certain officers of the court (see paragraphs 41-42 and 62 above). The Court also finds it relevant in this connection that the Government did not contest the applicants' allegation that O.S.H. was intending to run in the upcoming elections for the post of CSM president and that her intentions were publicly known at the time (see paragraph 87 above).

123. The Court notes also that the applicants' and O.S.H.'s submissions before the domestic courts pointed to a wider background to the above-mentioned context, consisting of some animosity between O.S.H. and *Lumea Justiţiei* (see paragraphs 35-36 and 38-39), and campaigns organised by the media in general which were critical of individuals working in key judicial institutions (see paragraph 80 above). However, none of the courts took the view that the articles concerning O.S.H. had been part of a media campaign amounting to harassment or that their publication had pursued any goal other than participating in a public debate. The courts considered that the ultimate aim of the article**s** published by the applicants, including the article of 2 August 2012, was to raise questions about the manner in which the justice system worked and the moral and professional probity of those called to protect it (see paragraphs 42, 46 and 62 above).

124. The Court observes that the article of 2 August 2012 focused on the career of a CSM member, who was also vice-president of the organisation at the time when the article was published, and her work as prosecutor. The article did not concern O.S.H.'s private life, but rather her professional activity and rise to a high-ranking position within the CSM and ultimately the justice system.

125. In these circumstances, and in the absence of any argument or evidence submitted by the Government capable of refuting the findings of the national courts, the Court sees no reason to disagree with the courts' assessment that the article edited and published by the applicants concerned matters of general interest regarding the organisation and functioning of the justice system (see *Morice*, cited above, § 128). Accordingly, the authorities had a particularly narrow margin of appreciation in assessing the need for the interference with the applicants' freedom of expression (see, for example, *Morice*, cited above, § 125; *Novaya Gazeta and Milashina*, cited above, § 66; and *Monica Macovei v. Romania*, no. 53028/14, §§ 86-87, 28 July 2020).

(β) How well known is the person concerned and her prior conduct

126. The Court notes that the parties appear to disagree (see paragraphs 87-88 and 98 above) about the level of protection of O.S.H.'s right to respect for her private life. The applicants argued that O.S.H. was not an actively working officer of the court at the time when the article was published, but rather a politician of the legal system and an elected public official. Therefore, unlike an officer of the court, but just like a politician, she had exposed herself consciously and voluntarily to close public scrutiny of

her activities, and therefore had to show a higher degree of tolerance to criticism.

127. Like the national courts, the Court observes in this connection, for its part, that in August 2012, O.S.H. was a high-ranking publicly elected official who had received attention from the press even before the publication of the article in question in the present case (see paragraphs 38 and 42 above). In addition, the Court notes that it was apparently public knowledge that O.S.H. was preparing to run in the elections for a position, namely that of CSM president, that was even more prominent than the one she already occupied (see paragraphs 29, 87 and 122 above)**.**

128. The Court observes further that it has accepted, in the context of an application made by a public servant to occupy a managerial post that could be regarded as being of a particular public concern, that such a public servant must be considered to have inevitably and knowingly entered the public domain and laid himself or herself open to close scrutiny of his or her acts and that the limits of acceptable criticism must accordingly be wider than in the case of an ordinary professional (see *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 98, 27 June 2017).

129. In these circumstances, also taking into account the inherent duties and responsibilities with respect to the justice system entailed by her status as prosecutor and CSM member (see paragraphs 26, 36, 73-76 and 116 above), the Court is of the opinion that O.S.H. could not be compared to an actual politician. Nonetheless, without losing sight of the special role of the judiciary in society and its special need for public confidence, the Court takes the view that O.S.H. belonged to a group of persons who could not claim protection of her right to respect for her private life in the same way as an ordinary citizen (see paragraph 116 above), or even a professional for that matter, could. She was therefore subject to wider limits of acceptable criticism than ordinary individuals and professionals.

(γ) The subject of the article, method of obtaining the information and its veracity, content, form and consequences of the publication

130. The Court notes at the outset that the initial defamation claim against the applicants raised broader complaints, namely of waging a defamatory press campaign against O.S.H. consisting of thirty-six articles which concerned O.S.H.'s activities and career (see paragraphs 30 and 42 above). The Court further notes that the article of 2 August 2012 discussed the N.T. case by relying on previous press articles which had concerned the same events, on the judgment delivered by the national courts in respect of that case and on an ongoing criminal complaint brought by N.T. against O.S.H. (see paragraphs 21-25 and 27-28 above). The method used to obtain the information reported could, therefore, not be questioned.

131. The first-instance court rejected O.S.H.'s action with regard to most of the thirty-six articles, but allowed it with respect to the five press articles that were focused on the N.T. case. It held that even though the articles had relied on a sufficient factual basis, they did not present the responsibilities of a superior prosecutor clearly, and used excessively critical, emotional and offensive language (see paragraphs 46-52 above).

132. Unlike the first-instance court, the Court of Appeal considered that in a similar way to most of the articles in the press campaign, four of the articles that concerned the circumstances surrounding the N.T. case, namely those published from 4 to 31 January 2013, had relied on a sufficient factual basis and the applicants had acted in good faith when publishing them, and that the expressions used therein (see paragraph 50 above) had remained within the limits of journalistic freedom of expression (see paragraphs 64-65 above). Moreover, the last-instance court did not expressly find the above-mentioned expressions to be markedly different from the similar ones contained in the article of 2 August 2012 (see paragraphs 26-28 and 50 above). However, the Court of Appeal's judgment singled out for the first time some specific statements in the article of 2 August 2012 for which it found the applicants liable. The Court is mindful of this fact, as it has inevitably influenced the applicants' ability to defend themselves.

133. The Court notes that the last-instance court sentenced the applicants to pay compensation for non-pecuniary damage to O.S.H. because the article of 2 August 2012 had relied on the text of the judgment acquitting N.T. to make a specific accusation against O.S.H., even though the text of the judgment in question had not supported such an accusation (see paragraph 66 above). The last-instance court took the view that by using the expressions "Find out [about] the prosecution's abuses, noted by the judges in this case!" and "The judges noted the pressure [put] by the prosecutors on [the] witnesses", the article had falsely stated in effect that the judges had noted that the miscarriage of justice of accusing an innocent person of murder had been the result of the abuses committed by the case prosecutor and O.S.H., which had consisted in the pressure put by the two prosecutors on the witnesses. The Court of Appeal further concluded that the applicants had not acted in good faith because they had misrepresented the information available in the judgment of acquittal when presenting the information to the public (i) since the fact that the court which acquitted N.T. had reproduced the witness's reasons for changing his statements from the criminal investigation stage of the proceedings had not meant that that court had considered itself that prosecutorial pressure had existed or that the reasons given by the witness had been true and (ii) since O.S.H. had not been responsible for interviewing witnesses in her position of superior prosecutor, and not even the witness had suggested that she had committed an abuse against him given that he had referred only to the case prosecutor. Lastly, the Court of Appeal considered that the clear and specific accusations made in the article against O.S.H. had

gone beyond mere value judgments and had intentionally defamed her (see paragraphs 66-70 above).

134. The Court notes that the national courts are, in principle, better placed than an international court to assess the intention behind impugned phrases and statements and, in particular, to judge how the general public would interpret and react to them (see *Monica Macovei*, cited above, § 88, with further references).

135. Nevertheless, when exercising its supervisory function, in order to determine whether the above description of the statements and the manner in which the domestic courts dealt with the present case were in conformity with Convention standards, the Court will examine the expressions themselves, including the form in which the impugned remarks were conveyed and their context (see *Makraduli v. the former Yugoslav Republic of Macedonia*, nos. 64659/11 and 24133/13, § 77, 19 July 2018). In doing so, it will bear in mind the fact that an applicant clearly involved in a public debate on an important issue is required to fulfil a no more demanding standard than that of due diligence, as in such circumstances an obligation to prove the factual statements may deprive him or her of the protection afforded by Article 10 (see *Monica Macovei*, cited above, § 75, with further references) and that he or she is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements (see *Do Carmo de Portugal e Castro Câmara v. Portugal*, no. 53139/11, § 43, 4 October 2016, and *Monica Macovei*, cited above, § 93). The Court will also not lose sight of the fact that, as indicated above (see paragraph 113), gravely damaging attacks that are essentially unfounded may require measures that protect the public's confidence in the judiciary, especially in view of the fact that the members of the judiciary may be subject to a duty of discretion that precludes them from replying.

136. In this connection, the Court notes that the Court of Appeal took the view that the impugned assertions contained in the article of 2 August 2012 might be perceived as statements of fact (see the case-law quoted in paragraph 119 above). The Court does not have to rule on the question whether the impugned statements contained a value judgment or a factual allegation, the question that remains is whether a sufficiently accurate and reliable factual basis proportionate to the nature and degree of the article's statements and allegations can be established (see, *mutatis mutandis*, *Reznik v. Russia*, no. 4977/05, § 46, 4 April 2013, and *Rungainis v. Latvia*, no. 40597/08, § 63, 14 June 2018).

137. The Court notes, in the same way as the Court of Appeal, that there can be no doubt that the text of the judgment of acquittal delivered by the courts in the N.T. case (see paragraphs 9-20 above) did not include any express statement by the judges that they had noted either prosecution abuses or pressure put by the prosecutors on the witnesses.

138. In contrast, the Court also notes that in singling out the specific statements in the article of 2 August 2012 which it found defamatory (see paragraphs 67 and 133 above) and interpreting them as being about O.S.H., the Court of Appeal took a rather selective approach in its reading of that article. It held the applicants liable for defamation by relying on the impugned statements taken out of the overall context of the thirty-six articles in general and of the article of 2 August 2012 in particular, and on two main arguments, namely that the N.T. acquittal judgment did not expressly state that it gave credit to the witness's allegations that abuses had been committed, and that the superior prosecutor was not involved in the interviewing of witnesses (see paragraph 133 above).

139. The Court is not convinced that the Court of Appeal provided sufficient reasons for this selective approach in its reading of the impugned statements or for its conclusion that there was no factual support for those statements. In doing so, the Court of Appeal ignored the fact that the impugned statements were part of a lengthy and detailed description and analysis of the circumstances surrounding the investigation in the N.T. case and the roles played by each of the two prosecutors involved in the processing of the case, as well as their duties, and the procedural shortcomings that had affected its outcome.

140. The N.T. acquittal judgment reproduced in detail C.Z.'s witness statements alleging that abuses had been committed during his initial interview. In the context of an acquittal, the Court considers that such a detailed rendition of the testimony of a key witness could reasonably be interpreted as an indication that it had been given credibility by the court which delivered the acquittal judgment. Taking into account in addition the acquittal judgment's explicit criticism of the prosecutor's failure to ensure assistance for an under-age witness, and its conclusion that the initial statements of the witness had been suggested to him at the investigation stage of the proceedings (see paragraph 19 above), the interpretation of the acquittal judgment as implicitly endorsing that witness's allegations of abuses being committed becomes, in the Court's view, even more credible.

141. As to whether O.S.H. could personally be criticised for an allegedly unlawful interview of the witness, the Court notes that O.S.H. acknowledged that she was under a legal duty as superior prosecutor to check whether the indictment and the criminal investigation acts carried out by the case prosecutor had been lawful and well-founded (see paragraphs 33 and 61 above). She also acknowledged that her duty entailed, *inter alia*, establishing whether the criminal procedure had been followed (see paragraph 33 above). It is undoubtedly true that there was no evidence of O.S.H. participating, in whatever form, in the faulty initial interview of the witnesses in the N.T. case. However, an under-age witness was still questioned without the legally required assistance. Thus, an argument that, as a superior prosecutor O.S.H. should have performed a more thorough review of that shortcoming of a

procedural nature, which was indicated by the acquittal judgment, does not appear in the Court's opinion to be frivolous either.

142. The Court is, therefore, not convinced that the impugned statements in the article of 2 August 2012 (see paragraph 138 above) were devoid of any factual basis.

143. The Court takes into account three additional reasons in its conclusions as to the method of obtaining the information, and its veracity, content and form. First, one of the impugned statements, namely "[t]he judges noted the pressure [put] by the prosecutors on [the] witnesses", was neither novel nor presented as a novelty, considering that the article left no doubt that this remark had been part of the title of a totally different article published by the publication in July 2012, which was used to raise further questions about something that seems that had already been subject to public discussion (see paragraphs 27 and 66-67 above). Secondly, the applicants also relied on another argument in support of their criticism of O.S.H. and her role in the N.T. investigation, supported by the findings in the N.T. acquittal judgment. They argued that O.S.H. had been under a duty to review and prevent reliance on the expert report in the case, which was not in fact produced by an authorised expert (see paragraph 57 above). Lastly, the impugned article included as an attachment the full text of the acquittal judgment in the N.T. case (see paragraphs 9-19 and 28 above), allowing readers to assess critically the information provided in the article.

144. The Court of Appeal failed to weigh the overall implications of those facts taken in their entirety in its analysis of the applicants' Article 10 rights, whereas in the view of the Court, they are relevant. Taking those facts into account, as well as its preceding analysis, the Court cannot accept that the impugned statements were made frivolously, without a prior attempt to research the circumstances surrounding the investigation in the N.T. case and the actual role played by O.S.H. in that investigation. While the specific wording used in the impugned statements was imprecise and could be interpreted as wrongfully suggesting responsibility on the part of O.S.H. for an event for which she was not in fact responsible, the Court is of the opinion that the article's allegations and the expressions used had a sufficient factual basis. While perhaps worded in an inappropriately categoric form, they still came within the limit of the permitted degree of exaggeration, given the wider limits of acceptable criticism in the present case (see paragraph 129 above).

145. In this connection, the Court finds it relevant that even though O.S.H. appears to have been given several chances by the publication to comment on the information published and the allegations made about the N.T. case, she made no apparent attempt to use them (see paragraphs 27, 57 and 71 above). The Court of Appeal held that those opportunities given by the applicants to O.S.H. to react publicly were irrelevant, as they could not "mend or repair" the damage caused by the statement made in the article (see paragraph 71 above).

146. The Court does not find this reasoning convincing. It has held on many occasions that the right of reply, is an important element of freedom of expression, which falls within the scope of Article 10 of the Convention. This flows from the need not only to be able to contest untruthful information, but also to ensure a plurality of opinions, especially on matters of general interest (see *Kaperzyński v. Poland*, no. 43206/07, § 66, 3 April 2012, with further references). Even assuming that the Court of Appeal's finding above may be read to have been prompted by concerns about the duty of restraint of judicial officers and the need to preserve the public's confidence in the work performed by prosecutors or CSM members, O.S.H. herself did not seem to have shared the Court of Appeal's possible concerns since she used other media outlets in order to comment on and explain the role and legal authority of a superior prosecutor in a criminal case.

147. As to the consequences of the article, the Court notes that none of the domestic courts pointed to any specific negative impact or effects the article might have had for O.S.H.'s professional reputation or life, given that, as also acknowledged by the first-instance court, in early 2013 she was elected president of the CSM (see paragraph 29 above). Even if it may be presumed that the publication of an article in a newspaper with an editorial profile focusing on the justice system might have affected her to some extent, the Court has serious doubts that the consequences suffered by her were sufficiently serious to override the public's interest in receiving the information contained therein (see *Țiriac v. Romania*, no. 51107/16, § 98, 30 November 2021).

(δ) The severity of the sanction imposed

148. The Court observes that the applicants were ordered to pay O.S.H. damages of EUR 1,000 and costs and expenses in the amount of EUR 762, and to publish the operative part of the judgment at their expense in the publication *Lumea Justiţiei* (see paragraph 46 above). It observes further that when conducting its assessment in this connection, the Court of Appeal was mindful of the effect that severe sanctions could have on the press when reporting on issues of public interest, and lowered accordingly the sanction imposed on the applicants by the first-instance court (see paragraph 72 above). Reiterating its view on the chilling effect that a fear of sanction may have on the exercise of freedom of expression (see, for instance, *Wille v. Liechtenstein* [GC], no. 28396/95, § 50, ECHR 1999-VII, and *Nikula*, cited above, § 54), and even though the applicants have not shown whether or not they struggled to pay the amounts required of them in order to comply with the last-instance court's judgment, the Court is nevertheless of the view that, under the circumstances, the sanction imposed was capable of having a dissuasive effect on the exercise of the applicants' right to freedom of expression (see, for instance, *Lombardo and Others v. Malta*, no. 7333/06, § 61, 24 April 2007).

(iii) Conclusion

149. In the light of the above, the Court considers that the national courts' decision to restrict the applicants' freedom of expression was supported by reasons which though relevant were not sufficient for the purposes of the test of "necessity" under Article 10 § 2 of the Convention. The interference was thus not necessary in a democratic society within the meaning of Article 10 of the Convention. There has accordingly been a violation of that Article.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

150. Article 41 of the Convention provides:

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

A. Damage

151. The applicant company claimed 1,762 euros (EUR) in respect of pecuniary damage. Its claim included 4,422 Romanian lei (RON – equivalent to EUR 1,000), being the amount the applicants had been ordered to pay to O.S.H. by the national courts in respect of non-pecuniary damage, and RON 3,370 (equivalent to EUR 762), being the amount the applicants had been ordered to pay to O.S.H. by the national courts in respect of costs and expenses (see paragraph 62 above). The applicant company submitted copies of bank transfer orders attesting to the payment of the amounts claimed.

152. The first two applicants each claimed EUR 3,000, and the applicant company EUR 2,500, in respect of non-pecuniary damage for the negative impact on their credibility and professional reputation caused by the sentence imposed on them by the last-instance court.

153. The Government argued that the applicants could not have any expectation to be awarded pecuniary damages because the first two applicants had not asked for such compensation and because the sentence imposed on the applicants had not affected their right to freedom of expression.

154. As regards the applicants' claim in respect of non-pecuniary damage, the Government argued that a company could claim in respect of non-pecuniary damage only in exceptional circumstances and only after it had proven the damage suffered. In any event, the applicants' claim was excessive, and the possible finding of a violation would constitute sufficient just satisfaction in their case.

155. The Court notes that the Government have not denied the existence of a clear link between the sentence imposed on the applicants and the amounts paid by the applicant company to O.S.H. The Court, therefore,

awards the applicant company EUR 1,762, plus any tax that may be chargeable, in respect of pecuniary damage.

156. As regards the applicants' claim in respect of non-pecuniary damage, given the circumstances of the case, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage the applicants must have suffered on account of the sentence imposed on them (see *Fressoz and Roire*, cited above, § 65, and *Petro Carbo Chem S.E. v. Romania*, no. 21768/12, § 79, 30 June 2020). The Court therefore dismisses the applicants' claim in this respect.

B. Costs and expenses

157. The first two applicants claimed, respectively, EUR 567 and EUR 553 for costs and expenses, namely the lawyer's fees incurred before the domestic courts. The applicant company claimed EUR 558 for costs and expenses, namely the lawyer's fees and correspondence costs incurred before the domestic courts and the Court. The applicants submitted copies of bank transfer orders and invoices attesting to the payment of the amounts claimed.

158. The Government argued that the applicants have not submitted sufficient documents which could attest that the amounts claimed by them had been actually and necessarily incurred.

159. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the amounts actually claimed by each of the applicants for costs and expenses, the documents in its possession, the complexity of the issues discussed, and the above criteria, the Court considers it reasonable to award the applicants the amounts claimed by each of them for the costs and expenses incurred before the domestic courts and the Court, plus any tax that may be chargeable to the applicants.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by four votes to three, that there has been a violation of Article 10 of the Convention;

3. *Holds*, by four votes to three,
   (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 1,762 (one thousand seven hundred and sixty-two euros), plus any tax that may be chargeable, to the applicant company in respect of pecuniary damage;
      (ii) EUR 567 (five hundred and sixty-seven euros) to the first applicant in respect of costs and expenses, plus any tax that may be chargeable to her;
      (iii) EUR 553 (five hundred and fifty-three euros) to the second applicant in respect of costs and expenses, plus any tax that may be chargeable to him;
      (iv) EUR 558 (five hundred and fifty-eight euros) to the applicant company in respect of costs and expenses, plus any tax that may be chargeable to it;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Holds*, unanimously, that the finding of a violation constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;

5. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 18 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth	Yonko Grozev
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint separate opinion of Judges K. Wojtyczek, F. Vehabović, and A. Harutyunyan is annexed to this judgment.

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JOINT DISSENTING OPINION OF JUDGES WOJTYCZEK, VEHABOVIĆ AND HARUTYUNYAN

1. We respectfully disagree with the view that Article 10 of the Convention has been violated in the instant case.

2. We agree, in general, with the methodology applied by the majority, however we diverge on some more specific points and, in particular, on: (i) the precise formulation of the standard of protection provided to judges and prosecutors against abusive speech, (ii) the weight of the authority of justice as a ground justifying limitations upon speech, and (iii) the evaluation of the domestic judgments and, in particular, the assessment as to whether the factual basis for the impugned statements was sufficient.

3. We fully agree with the starting premise expressed in paragraph 118 in the following terms: "Where the balancing exercise between the rights protected by Articles 8 and 10 of the Convention has been undertaken 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 that of the domestic courts."

We would like to add that the impugned restrictions upon the applicant's freedom of speech were imposed in the context of a civil-law dispute between private parties for the sake of protecting the reputation of the other party, namely O.S.H. The instant judgment declares the protection provided by the domestic courts to O.S.H. to be contrary to the Convention and therefore affects O.S.H.'s legal and factual position. At the same time, O.S.H. has not been invited to present her submissions before the Court in order to defend her legitimate interests. This fact is an additional argument for judicial caution and against substituting the Court's view for that of the domestic courts in the instant case.

4. We agree with the following assumption in paragraph 129: "the Court takes the view that O.S.H. belonged to a group of persons who could not claim protection of her right to respect for her private life in the same way as an ordinary citizen (see paragraph 116 above), or even a professional for that matter, could. She was therefore subject to wider limits of acceptable criticism than ordinary individuals and professionals."

5. We further agree with the standard formulated in paragraph 136: "the question that remains is whether a sufficiently accurate and reliable factual basis proportionate to the nature and degree of the article's statements and allegations can be established (see, *mutatis mutandis*, *Reznik v. Russia*, no. 4977/05, § 46, 4 April 2013, and *Rungainis v. Latvia*, no. 40597/08, § 63, 14 June 2018)."

We note however that this standard is not consistently applied throughout the reasoning and the majority refer also to the more lenient standard of the existence of "any factual basis" (see paragraph 142). Moreover, it is not clear how the standard of "sufficient/insufficient factual basis" has to be articulated

with the standard of "gravely damaging attacks which are essentially unfounded" (see paragraph 7 below). The two standards are not identical.

6. We note that in some States, including Romania, the judicial system, as well as individual judges and prosecutors, are sometimes subject to harsh criticism and attacks which tend to undermine public confidence in the integrity of the judiciary. Such attacks may further fuel demagogy and prepare grounds for structural reforms impairing the quality of that system. We would like to highlight here the following assessment made by the Commission to the European Parliament and the Council, in its report of 2013 (see paragraph 80): "The Commission would also like to draw attention to the role of the media. There have been numerous examples of the media exercising pressure on the judiciary, as well as particular doubts whether the National Audiovisual Council is proving an effective watchdog. The situation suggests the need for a review of existing rules, to ensure that freedom of the press is accompanied by a proper protection of institutions and of individuals' fundamental rights as well as to provide for effective redress."

In this context, maintaining the authority and impartiality of the judiciary, as provided in Article 10 § 2 of the Convention, is an objective whose significant weight has to be duly taken into account when weighing up the conflicting values in freedom of expression cases.

7. The majority (quoting *Morice v. France* [GC], no. 29369/10, § 128, ECHR 2015) appear to limit the protection offered to judges and prosecutors to "gravely damaging attacks which are essentially unfounded" (see paragraphs 113 and 135). In our view, such a restrictive reading of the reasoning in *Morice* is not justified and protection should not be limited to gravely damaging attacks but should extend to other untrue factual statements or excessive value judgments damaging the reputation of judges and prosecutors, if such statements and value judgments are devoid of a sufficient factual basis.

8. The majority reproach the domestic courts for a certain number of shortcomings in their reasoning and rely, in particular, upon the following arguments (see paragraph 139): "The Court is not convinced that the Court of Appeal provided sufficient reasons for this selective approach in its reading of the impugned statements or for its conclusion that there was no factual support for those statements. In doing so, the Court of Appeal ignored the fact that the impugned statements were part of a lengthy and detailed description and analysis of the circumstances ...". In our reading, the domestic judgments, in their reasoning, while focusing on the impact of a few specific statements have not overlooked at all this broader context (see in particular paragraphs 62-64). Moreover, this broader context does not appear to attenuate the damaging force of the impugned statements. We would note here that the statements in the article that were singled out by the last-instance court as being problematic (see paragraph 67) were analysed in the context of the circumstances surrounding the investigation in the N.T. case and the

roles played by each of the two prosecutors involved in the processing of the case, as well as their duties, degree of responsibility connected to that case and the procedural shortcomings that had affected its outcome (see in particular the summary of the domestic judgment provided in paragraph 68).

The majority further attach particular importance to the fact that "even though O.S.H. appears have been given several chances by the publication to comment on the information published and the allegations made about the N.T. case, she made no apparent attempt to use them" (paragraph 145). We do not find this part of the reasoning convincing. Although respect for the right to reply may be an important circumstance in some cases, thus indicating that the tenets of responsible journalism have been observed, this issue does not appear relevant in the instant case. The fact that the person concerned declined to reply to a press publication does not extend (*ex post*) the scope of the journalists' freedom of speech and does not make the factual basis more solid.

Given the available evidence, we see no reason to call into question the Court of Appeal's general assessment or its specific finding to the effect that the applicants' disputed statements were not supported by a sufficient factual basis and could be considered to constitute a potentially gravely damaging attack. More generally, we consider that the case was thoroughly considered by the domestic courts, which provided extensive and persuasive arguments in support of their judgments and we do not see sufficient reasons for the Court to substitute its own views for those of the domestic courts.

9. The majority underline in paragraph 148 that "under the circumstances, the sanction imposed was capable of having a dissuasive effect on the exercise of the applicants' right to freedom of expression". We respectfully disagree. The sanction imposed was one of a purely civil nature, it does not appear excessive in the circumstances of the case and it was not of such a kind as to have a "chilling" effect. Reversing the argument referring to this effect, we note in this context that the lack of an adequate sanction for abusive speech may have an "emboldening effect" and contribute to the brutalisation of public debate.

10. The majority rightly acknowledge in paragraph 144 the following crucial points: (i) "the specific wording used in the impugned statements was imprecise and could be interpreted as wrongfully suggesting responsibility on the part of O.S.H. for an event for which she was not in fact responsible", (ii) they were "worded in an inappropriately categoric form" and (iii) they were written with some "degree of exaggeration".

In our assessment, although wider limits of acceptable criticism apply to prosecutors and although the article's statements and allegations were not devoid of "any factual basis", they were not based upon a sufficiently accurate and reliable factual basis or proportionate to the nature and degree of their content and, as a result, went beyond the limits of the permitted degree of exaggeration.