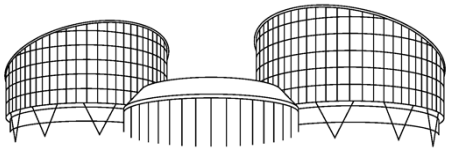

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF BENITEZ MORIANA AND IÑIGO FERNANDEZ v. SPAIN

(Applications nos. 36537/15 and 36539/15)

JUDGMENT

Art 10 • Freedom of expression • Unjustified criminal conviction of non-profit-making association members, for open letter in newspaper criticising a judge in proceedings on environmental issue • Criticisms of a nature that a judge could expect to receive in the performance of their duties and not capable of undermining the proper conduct of judicial proceedings • Significant sanctions of criminal nature imposed, without considering that the remarks were made by laymen who were not parties in the proceedings

STRASBOURG

9 March 2021

FINAL

09/06/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Benitez Moriana and Iñigo Fernandez v. Spain,

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

Paul Lemmens, *President,*
Georgios A. Serghides,
Georges Ravarani,
María Elósegui,
Darian Pavli,
Anja Seibert-Fohr,
Peeter Roosma, *judges,*
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the applications (nos. 36537/15 and 36539/15) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Spanish nationals, Mr Sergio Benitez Moriana and Mr Ivo Aragón Iñigo Fernandez against Spain ("the applicants"), on 16 July 2015;

the decision to give notice of the applications to the Spanish Government ("the Government");

the parties' observations;

Having deliberated in private on 8 December 2020 and 2 February 2021,

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

INTRODUCTION

1. The case concerns the alleged violation of the applicants' right to freedom of expression because of their criminal conviction for the publication of an open letter in a local newspaper complaining of the conduct of a judge in proceedings affecting them.

THE FACTS

2. The applicants were born in 1977 and 1976 respectively and live in Jaca (Huesca) and Madrid. They were represented by Ms Aranda Iglesias, a lawyer practising in Madrid.

3. The Government were represented by their Agent, Mr Rafael-Andrés León Cavero, State Attorney.

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

5. The applicants are members of the board of Plataforma Ciudadana Aguilar Natural, a non-profit-making association constituted on 19 April 2008 with the aim of promoting sustainable economic development, exploiting natural resources within the limits of their regeneration, and

guaranteeing the conservation of the landscapes and natural environment of the village of Aguilar del Alfambra (Teruel).

I. BACKGROUND TO THE CASE (PROCEEDINGS RELATING TO A MINING LICENCE)

6. On 14 August 2007 Watts Blake Bearner España S.A. (WBB), holder of a mining contract, applied to the Aguilar del Alfambra municipal council for an environmental licence for classified activities.

7. WBB's request for an environmental licence was initially positively assessed by an architectural consultancy firm but was then re-examined. A second technical analysis was required, which was carried out on 31 March 2008 by an architect, Mr I.Z.

8. By a decree of 25 June 2008, the municipal council declared the proceedings requesting the administrative licence null and void up to that point, in so far as the classified activities for which the licence had been requested required an analysis to evaluate their environmental impact, and not a simple administrative licence.

9. On 24 September 2008 WBB brought a judicial administrative appeal against the decree before administrative judge no. 1 of Teruel.

10. In view of the contradictory assessments mentioned above, the judge requested an independent expert, whose name was drawn from a list of five mining engineers submitted by the Official Association of Mining Engineers. The expert was appointed by the judge in the presence of the parties, and no objection was raised. The municipal council contested the report produced by the appointed expert, Mr M.A., an engineer. The company WBB cast doubt on the impartiality of the report by Mr I.Z. and on his professional capacity.

11. By a judgment of 25 November 2009, the judge ruled that the application was admissible and declared the decree of 25 June 2008 null and void. That ruling was based on the conclusions drawn by the expert M.A. whom the judge had appointed. The judge decided to follow the conclusions of the report presented by M.A. because of its clarity, coherence and forcefulness of its explanations, the impartiality of its author insofar as he had been designated in the course of the judicial proceedings and because Mr I.Z. was the father of the second applicant before the Court.

12. On 18 December 2009 the municipal council lodged an appeal with the Administrative Chamber of the Aragon High Court.

13. On 30 November 2012 the High Court dismissed the appeal, relying on the same reasons given by the first-instance judge, namely on I.Z.'s lack of qualifications as an engineer and his lack of impartiality owing to his family ties to one of the members of Plataforma Ciudadana Aguilar Natural.

II. CRIMINAL PROCEEDINGS BROUGHT AGAINST THE APPLICANTS

14. On 11 March 2010, while the appeal against the first judgment was pending, the applicants published an open letter to the first-instance judge in the "Letters to the Editor" section of a local newspaper, *Diario de Teruel.* It read as follows:

> "OPEN LETTER TO Ms [M.M.], ADMINISTRATIVE JUDGE OF TERUEL
>
> Ms [M.M.],
>
> With regard to judgment no. ... issued by your court in the lawsuit between [WBB] and the municipal council of Aguilar del Alfambra, which we abide by even though it is by no means fair, you have demonstrated your partiality and lack of competence.
>
> The judgment shows that you were not interested whatsoever in the technical matters at issue. You concluded, for no proper reason, that the expert responsible for assessing the project was independent and impartial, by ignoring his technical and methodological deficiencies. You did not consider whether there could be something dubious in the expertise of somebody who had not set foot in Aguilar and had only used material and documentation provided by [WBB].
>
> On the other hand, you don't use against [WBB] the same arguments that you use to discredit the municipal council, despite their similarity. The first ground of your judgment consists of discrediting the report presented by the municipal council, [which was] drafted by an urban-planning architect and an urban-planning lawyer, because they are not mining engineers. However, you approve the report of a building engineer whose [professional] background is unknown, who has not read the planning legislation of Aguilar and who has no competence to give his views on planning issues ..., but who agrees with WBB. Furthermore, you discredit the report [of Mr I.Z.] owing to [his] family ties to ... a spokesperson for this platform. It is unacceptable that you hide the fact that the constitution of this platform and the election of its heads took place a long time after the drafting of the report.
>
> It is unacceptable that you accept without question the arguments of a witness, [Mr L.J.], who acknowledged his friendship with the president of [WBB] and who lied, scornfully, at the hearing. You have documentary evidence of this.
>
> But your sad work has not ended there. You are unaware of the relevant case-law, and what is worse, you outrageously washed your hands of the affair, even though you had documentary evidence challenging an expert opinion, but you did nothing. And you were not in the least disturbed when your expert did not answer a question which you had put.
>
> As a judge, madam, you represent the power of the State. Your decisions determine people's lives, or, in this case, the life of a whole village which attended the hearing (surely you had never seen the room so full). People who were waiting for your judgment with anticipation, and [who] deserved rigour and seriousness. [Waiting for] you to do a thorough job in reaching fair conclusions. But you were not willing to budge an inch in relation to technical matters, you ignored them. And [that] gives the impression that you ruled first and then came up with reasons, under the formal guise of a shaky expert opinion. Ms [M.M.], you have authority, but you do not represent justice."

15. A second text drafted by the applicants in response to a letter to the editor concerning their letter was published some days later in the same newspaper, explaining that they were not party to the proceedings before administrative judge no. 1 of Teruel, and that they were criticising, in a reasoned and well-founded manner, a judgment which affected the general interest, on the basis of facts supported by documents, except for the parts of their text containing opinions. They stated that they were acting within the limits of their right to freedom of expression.

16. Criminal proceedings against the applicants were started by the public prosecutor of his own motion. By a judgment of 10 July 2012, criminal judge no. 1 of Teruel found the applicants guilty of serious insult committed publicly. The conviction included a daily fine of 8 euros (EUR) for a period of ten months, with an alternative penalty of deprivation of liberty, the modalities of which were as follows: failure to pay the fine due for two days, that is, EUR 16, would result in a one-day deprivation of liberty. The applicants were ordered to have the judgment published in the same newspaper which had published their comments, at their own expense. The total fine was EUR 2,400 for each of the applicants, and the cost of the publishing was EUR 2,758.80. They also had to pay compensation to the administrative judge for non-pecuniary damage caused, in the amount of EUR 3,000 each.

17. The judgment stated:

> "In a case of this kind, where criticism focuses on a specific judge, the balancing [exercise] must be carried out by determining whether the remarks published in the newspaper were limited to criticism of the judgment or, on the contrary, went beyond this limit, formulating ideas and remarks directly aimed [personally] at the judge who [had] drafted it, whether on merely personal grounds, [or] on [the grounds of] her professional behaviour.
>
> ...
>
> Some of the written remarks, such as [those relating to the judge's] ignorance of the case-law or refusal to consider technical matters, could be considered to be within the limits of normal criticism if taken in isolation, but [taken] together with other [remarks] whose basis is not explained ... [they] became a personal attack against the person who was professionally performing [her] judicial function, turning the article into a personal denigration of the judge, [and] attributing to her a lack of competence, [a lack] of knowledge of the case-law and professional practice, and even an attitude contrary to judicial practice, by mentioning her 'partiality'."

18. The applicants lodged an appeal. By a judgment delivered on 29 January 2013, the *Audiencia Provincial* of Teruel upheld the judgment which had been appealed against, giving the following reasoning:

> "... the charging ... and the conviction [of the applicants were] not based on the fact that they [had] accused the [judge] of committing specific acts, such as founding her judgment on an expert's report considered by the [applicants] to be outrageously biased – which could be considered bitter but legitimate criticism of the attacked decision – but [were based] on value judgments [made] about [that judge], who [had

been] described as unjust, ignorant and biased. [These value judgments went] beyond the legitimate right to criticise and disagree with a judicial decision, and affect[ed] the core of human dignity ...

... in the exercise of freedom of expression and the right to criticise, the Constitution does not prohibit the use of hurtful, annoying or sharp remarks. However, constitutional protection under Article 20 § 1 (a) of the Constitution excludes remarks [which are] absolutely vexatious; namely, those remarks that, according to the specific circumstances of the case, and in total disregard of [their] truthfulness or untruthfulness, are offensive, ignominious or outrageous, unrelated to the ideas or opinions held, and therefore unnecessary for such a purpose and inappropriate to express the opinions or information concerned ... As the criminal judge reasonably argue[d] in the contested judgment, the legitimate right to criticise the administrative judge's decision might protect some of the remarks made in that letter, [such] as [those relating to] the [judge's] lack of interest as regards the technical matters at issue, her conclusion that the expert was independent, or even her lack of awareness of the relevant case-law. But [the legitimate right to criticise the administrative judge's decision] cannot protect some of the other remarks attributing to the judge ignorance, partiality or unjust behaviour, which directly affect[ed] the victim's core of human dignity ..."

19. The applicants lodged an *amparo* appeal with the Constitutional Court, alleging a breach of their right to freedom of expression.

20. On 6 February 2015 the public prosecutor intervened in the proceedings before the Constitutional Court in support of the applicants' arguments, and asked that court to conclude that there had been a violation of their right to freedom of expression and to declare null and void the contested judgments of 10 July 2012 of criminal judge no. 1 of Teruel and of 29 January 2013 of the *Audiencia Provincial* of Teruel.

21. By a judgment of 13 April 2015, the Constitutional Court dismissed the *amparo* appeal. The court referred to the limits of the right to freedom of expression:

"... even when the legal system does not prevent, without sufficient reason, the widest circulation and dissemination of ideas and opinions, [the] expression [of such ideas and opinions] always entails some duties and responsibilities, as does the exercise of any civil freedom, as the Court of Strasbourg regularly reiterates in this area (see, among other authorities, *Haldimann and Others v. Switzerland*, no. 21830/09, § 46, ECHR 2015). Regarding the present case, within these limits, it appears to be necessary to respect the honour of others (Article 20 § 4 of the Constitution), a constitutional asset which, in addition, has the quality of a fundamental right in itself (Article 18 § 1 of the Constitution) ..."

22. The Constitutional Court noted that the Constitution also protected professional life, and stated:

"Mere criticism of professional expertise in the performance of an activity should not, in itself, be confused with an attack on honour; but Article 18 § 1 of the Spanish Constitution protects [citizens] from criticism that, despite being formally directed against the professional activity of an individual, actually constitutes personal disparagement directly affecting the individual dignity [of the person], with special importance being attached to those [injurious remarks] that cast doubt [on the victim] or show disdain for [his] probity or ethics in the performance of that activity. This will

obviously depend on the circumstances of the case, on who [has been offended], [and on] how, when and in what way the professional standing of the offended person has been questioned."

23. The Constitutional Court noted that the right to freedom of expression did not encompass a right to proffer insults. It pointed out that the Constitution did not prohibit the use of injurious remarks in all circumstances. However, freedom of expression did not protect vexatious remarks which, regardless of their veracity, were offensive and humiliating and were not pertinent for the purpose of conveying the opinions or information in question. The Constitutional Court stated:

"... remarks that could ... damage the honour of others, owing to their insulting or outrageous nature, may only be considered legitimate, where appropriate, if, according to the context, they would be necessary or adequate in support of the discourse concerned, since ... if ... such remarks which may damage honour have been made independently, [in the absence] of [any] connection to the discourse to which they relate, or ... without the minimum factual basis that allows them adequate support, [one] would be left with pure insult, which, needless to say, our Constitution does not defend whatsoever ... the fundamental rule [which does not prohibit the use of injurious remarks in all circumstances] neither recognises nor accepts an alleged 'right to insult', [a right] which would be radically irreconcilable with persons' dignity (Article 10 § 1 of the Constitution). The constitutional protection granted by Article 20 § 1 of the Spanish Constitution does not therefore include 'the absolutely vexatious expressions, that is, those which, in the specific circumstances of the case, irrespective of their veracity, are offensive or outrageous and are irrelevant for expressing the opinions or information in question'."

24. As regards public servants and, in particular, judges, referring to *Belpietro v. Italy* (no. 43612/10, § 48, 24 September 2013), the Constitutional Court pointed out that judges were in a particular position, in so far as damage to their honour in the event of unfounded discredit would also be inextricably linked to confidence in justice in general. It stated:

"Unlike ... other authorities ..., judges – who ... express themselves only through their decisions – for obvious reasons of reserve, prudence and containment, lack the same personal capacity to reply which [other authorities] have in order to contest criticism of their function that they deem unfair, false or offensive to their professional honour [the court cited, among other authorities, *Prager and Oberschlick v. Austria*, 26 April 1995, § 34, Series A no. 313, and, *inter alia*, *Falter Zeitschriften GmbH v. Austria (no. 2)*, no. 3084/07, § 39, 18 September 2012].

...

Lastly, ... it should not be ignored that unfounded criticism of judges exercising their functions can not only damage their good professional reputation – as was raised in the proceedings in question – but also, as mentioned above, ... undermine public confidence in the judicial system (*Morice v. France*, no. 29369/10, § 107, 11 July 2013[1]), which is one of the existential pillars of the rule of law."

[1] *Morice v. France*, no. 29369/10, § 107, 11 July 2013, superseded by *Morice v. France* [GC], no. 29369/10, ECHR 2015.

25. The judgment was adopted by a majority of four judges. Two dissenting judges appended an opinion to the judgment.

RELEVANT LEGAL FRAMEWORK

26. The relevant provisions of the Spanish Constitution read as follows:

Article 18

"1. The right to honour, to personal and family privacy and to one's own image is guaranteed."

Article 20

"1. The following rights shall be recognised and protected:

(a) the right to freely express and disseminate thoughts, ideas and opinions orally, in writing or by any other means of reproduction;

...

4. These freedoms shall be limited by respect for the rights secured in this Part, by the provisions of the implementing Acts, and in particular by the right to honour and to a private life, and the right to control the use of one's image and to the protection of young persons and children."

27. The relevant provisions of the Criminal Code read as follows:

Article 208

"Acts or remarks which undermine another person's dignity by attacking his or her reputation or self-esteem shall constitute insult[s].

Only insults which, by virtue of their nature, effects and context, are generally acknowledged to be serious shall constitute an offence ...

Insults consisting in attributing facts to another person shall not be deemed serious, except when this has been done in the knowledge that [such statements of fact] are false, or with reckless disregard for the truth."

Article 209

"The offence of serious public insult shall be punishable by a day-fine payable for between six and fourteen months. Otherwise, the fine shall be payable for periods between three and seven months."

Article 210

"Whoever is accused of insult shall be exempt from all accountability if [he] proves the truth of statements [either] made against civil servants exercising their official duties or referring to the commission of criminal or administrative offences [by the civil servants]."

Article 211

"Slander and insult shall be deemed to have been public when disseminated by means of printed media, radio broadcasting or any other similarly effective means."

28. When their honour is attacked, public servants, including judges, may, in respect of acts during the exercise of their functions, bring civil or criminal actions against the offender.

In civil proceedings, no special requirements are established when a judge is offended by slander or insult (Article 249 § 1 of the Code of Civil Procedure). The public prosecutor intervenes as a party in civil proceedings as the guarantor of the legality and in protection of human rights.

In criminal proceedings, when a public servant, authority or agent (including judges) are offended by slander of insult, the procedure shall start *ex officio* by the public prosecutor when the offence concerns the exercise of their duties. In case the public prosecutor decides not to request the opening of the proceedings, the civil servant can still decide to appear as a private prosecutor (Article 109 bis of the Code of Criminal Procedure).

THE LAW

I. JOINDER OF THE APPLICATIONS

29. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

30. The applicants complained that the judgments of the domestic courts had unduly restricted their right to freedom of expression guaranteed by Article 10 of the Convention, which reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...

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

31. The Court notes that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

32. The applicants limited their observations to the claim in respect of just satisfaction.

33. The Government did not deny that the applicants' conviction had constituted an interference with the exercise of their right to freedom of expression. They took the view, however, that the interference had been prescribed by law and had pursued a legitimate aim. On that latter point, they argued that the interference had sought to maintain the authority and impartiality of the judiciary, and to ensure the protection of the reputation or rights of others.

34. The Government took the view that the applicants' statement in the media had concerned a subject of general interest, but that there had been no such public interest in insulting the judge who had been dealing with the ongoing proceedings, and this had been entirely unnecessary.

35. The Government submitted that attacks on judges did not contribute to informing the public about relevant issues, and reiterated that judges had no right of reply. They stated that it would be unfair if a judge's private life was adversely affected for this reason. As regards the judge in question, her behaviour had been irreproachable.

36. The Government pointed out that the applicants had not been parties to the administrative proceedings, and that many of the alleged facts in their open letter had been false. Moreover, mentioning the judge's name in the letter had been patently offensive; the publication of the letter in *Diario de Teruel* had resulted in its wide dissemination, and had affected the personal and family life of the judge to the greatest possible extent.

37. As to the sanction imposed on the applicants and the compensation for non-pecuniary damage which they had had to pay, the Government were of the view that they could not be regarded as excessive.

38. The Government thus submitted that there had been no violation of Article 10 of the Convention.

2. The Court's assessment

(a) Existence of an interference

39. The Court notes at the outset that it is not in dispute between the parties that the applicants' criminal conviction constituted an interference with the exercise of their right to freedom of expression as guaranteed by Article 10 of the Convention. That is also the Court's opinion.

(b) Justification for the interference

40. An interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph, and whether it was "necessary in a democratic society" in order to achieve the relevant aim or aims (see *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 67, ECHR 2004-XI, and *Ricci v. Italy*, no. 30210/06, § 43, 8 October 2013).

(i) Whether the interference was prescribed by law and had a legitimate aim

41. The legislation providing a basis for the proceedings brought against the applicants is set out in Articles 208 to 211 of the Spanish Criminal Code, which regulate the crime of insult. The Court is satisfied that the legislation is accessible, foreseeable and compatible with the rule of law.

42. The Government argued that the aim of the interference had been to protect the reputation or rights of others and to maintain the authority and impartiality of the judiciary. The Court does not see any reason to adopt a different view.

43. It therefore remains to be examined whether the interference was "necessary in a democratic society", and this requires the Court to ascertain whether it was proportionate to the legitimate aim pursued and whether the grounds given by the domestic courts were relevant and sufficient.

(ii) Whether the interference was necessary in a democratic society and proportionate

(α) General principles

44. In order to determine whether the interference was "necessary in a democratic society", the Court must ascertain whether it met a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see *Perinçek v. Switzerland* [GC], no. 27510/08, § 196 (iii), ECHR 2015 (extracts), and *Peruzzi v. Italy*, no. 39294/09, § 45, 30 June 2015).

45. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities, but rather to review under Article 10 the decisions they have delivered pursuant to their power of appreciation (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference are "relevant and sufficient" and whether the interference was "proportionate to the

legitimate aims pursued" (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI) and In so doing, the Court has to satisfy itself that the national authorities, basing their decisions on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see *Perinçek*, cited above, § 426, *Peruzzi*, cited above, §§ 46-47, and the references therein).

46. In addition, and in so far as the applicants' conviction pursued the legitimate aims referred to in paragraph 42 above, the Court refers to the general principles applicable to balancing the right to freedom of expression against the "protection of the reputation or rights of others", as summarised in *Perinçek*, cited above, § 198, and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* ([GC], no. 17224/11, § 77, 27 June 2017). For Article 8 to come into play, an attack on personal reputation must reach a certain level of seriousness (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012; *Bédat v. Switzerland* [GC], no. 56925/08, § 72, 29 March 2016; and *Medžlis Islamske Zajednice Brčko and Others*, cited above, §§ 76-79).

47. Moreover, and in so far as an interference with freedom of expression in the context of the alleged defamation of a judge is concerned, the Court refers to *Miljević v. Croatia* (no. 68317/13, § 53, 25 June 2020) and *Morice v. France* [GC] (no. 29369/10, §§ 124 et seq., ECHR 2015). The courts - the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence. They must accordingly be protected from destructive attacks that are 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. Unfounded attacks can be an obstacle to public servants performing their duty (see *Janowski v. Poland*, no. 25716/94, § 33, 21 January 1999, and *Nikula v. Finland*, no. 31611/96, § 48, ECHR 2002-II), and this protection also applies specifically to the judiciary. The judiciary must be in a position where it can be respected by the accused and in public opinion (see *Vides Aizsardzības Klubs v. Latvia*, no. 57829/00, § 42, 27 May 2004; *Kudeshkina v. Russia*, no. 29492/05, § 86, 26 February 2009, and the references therein; and *Medžlis Islamske Zajednice Brčko and Others*, cited above, §§ 86-87).

48. As regards the level of protection of freedom of expression, there is little scope under Article 10 § 2 of the Convention for restrictions on debate on matters of public interest. Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest, as is the case, in particular, for remarks on the functioning of the judiciary, even in the context of proceedings that are still pending in respect of other defendants. A degree of hostility and the potential seriousness of certain remarks do not obviate the right to a high level of protection of freedom of expression, given the

existence of a matter of public interest (see *Paturel v. France*, no. 54968/00, § 42, 22 December 2005, and *Morice* [GC], cited above, § 125). Save in the case of gravely damaging attacks that are essentially unfounded, judges 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* [GC], cited above, § 131).

49. Lastly, the Court reiterates that, in assessing the proportionality of the interference, the nature and severity of the sanctions imposed are also factors to be taken into account. As the Court has previously pointed out, interference with freedom of expression may have a chilling effect on the exercise of that freedom. The relatively moderate nature of a criminal fine (see *Mor v. France*, no. 28198/09, § 61, 15 December 2011) does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression. Generally speaking, while it is legitimate for the institutions of the State, as guarantors of the institutional public order, to be protected by the competent authorities, the dominant position occupied by those institutions requires the authorities to display restraint in resorting to criminal proceedings (see *Morice* [GC], cited above, § 127, with further references).

(β) Contribution to a debate on a matter of public interest

50. Turning to the present case, the Court takes the view that the applicants' impugned remarks – which concerned the functioning of the judiciary, in the context of proceedings which were still ongoing, and in a matter of environmental relevance for the local population – fell within the context of a debate on a matter of public interest. Moreover, the Court has accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, ECHR 2013 (extracts)) and may be characterised as a social "watchdog" warranting similar protection under the Convention as that afforded to the press (*ibid*., *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 166, 8 November 2016 and *Medžlis Islamske Zajednice Brčko and Others*, cited above, § 86). Questions concerning the functioning of the justice system, an institution that is essential for any democratic society, do indeed fall within the public interest. The applicants' remarks thus called for a high level of protection of freedom of expression, with a particularly narrow margin of appreciation accordingly being afforded to the authorities.

(γ) Nature of the impugned remarks and reasoning of the domestic courts

51. The Court has drawn a distinction between statements of fact and value judgments. The existence of facts can be demonstrated, whereas 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 *De Haes and Gijsels v. Belgium*, 24 February 1997, § 42, *Reports* 1997-I). However, where a statement amounts to a value judgment, the proportionality of an interference may depend on whether a sufficient "factual basis" for the impugned statement exists: if it does not, that value judgment may prove excessive (ibid., § 47; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 55, ECHR 2007-IV; and *Morice* [GC], cited above, § 126).

52. The Court notes that, in convicting the applicants, criminal judge no. 1 of Teruel took the view that the applicants had gone beyond the limit of criticising the judgment and had formulated "ideas and remarks directly aimed [personally] at the judge who [had] drafted [the judgment], whether on merely personal grounds, [or] on [the grounds of] her professional behaviour". This criticism had turned into "a personal attack against the person who [had been] professionally performing [her] judicial function, turning the article into a personal denigration of the judge, attributing to her a lack of competence, [a lack] of knowledge of the case-law and professional practice, and even an attitude contrary to judicial practice, by mentioning her 'partiality'" (see paragraph 17 above). The *Audiencia Provincial* of Teruel considered that the applicants had not only criticised the judge's decision, but also attributed to her "ignorance, partiality or unjust behavior, which directly affect[ed] [her] core of human dignity" (see paragraph 18 above). For the domestic courts, given the circumstances of the case, it appears to have been important to ensure that the protection of the judge's reputation should prevail over the applicants' right to freedom of expression.

53. The Court takes the view that, as established by the judgment of the *Audiencia Provincial* of Teruel (see paragraph 18 above), in the circumstances of the case, the impugned statements were more value judgments than pure statements of fact, in view of the general tone of the remarks and the context in which they were made, as they reflected mainly an overall assessment of the conduct of the administrative judge in the course of the proceedings.

54. It thus remains to be examined whether the "factual basis" for those value judgments was sufficient.

55. Turning to the text of the letter itself (see paragraph 14 above), the Court considers that the expressions used by the applicants had a sufficiently close connection with the facts of the case, in addition to the fact that their remarks could not be regarded as misleading and could be

inferred from the judgment. In substance, the applicants reproached Ms M.M. for two reasons: for taking unfair decisions, and for being a "biased" judge, having demonstrated her "partiality and lack of competence". The Court observes that the applicants are not lawyers and their comments about the professional conduct of the judge have to be considered in this regard, their open letter showing their profound disagreement with the specific procedural decisions and the overall outcome of the case. The Court reiterates in this connection that freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb" (see *De Haes and Gijsels*, cited above, § 46). Similarly, the use of a "caustic tone" in comments aimed at a judge is not incompatible with the provisions of Article 10 of the Convention (see, for example, *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal*, no. 1529/08, § 48, 29 March 2011). In the Court's view, the accusations made by the applicants in their letter were criticisms that a judge can expect to receive in the performance of his or her duties, were not entirely devoid of any factual grounds and therefore were not to be regarded as a gratuitous personal attack but as a fair comment on a matter of public importance (see *Kudeshkina*, cited above, § 95, and *Morice* [GC], cited above, § 125). It therefore does not appear that the disputed remarks have exceeded the limit of permissible criticism in this case.

(δ) Maintaining the authority of the judiciary

56. The Government relied on the fact that the judicial authorities had no right of reply.

57. The Court reiterates the general principles developed by it in this regard and summarised above in paragraph 47. Indeed, while it may prove necessary to protect the judiciary against gravely damaging attacks that are essentially unfounded, bearing in mind that in a number of countries judges are prevented from reacting by their duty of discretion, this cannot have the effect of prohibiting individuals from expressing their views, through value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system, or of banning any criticism of the latter. In the present case, judge M.M. was part of a fundamental institution of the State, she was therefore subject to wider limits of acceptable criticism than ordinary citizens (see *Morice* [GC], cited above, § 131).

(ε) The sanctions imposed

58. The Court has summarised the applicable principles in paragraph 49 above.

59. In the present case, criminal judge no. 1 of Teruel sentenced each of the applicants to a fine of EUR 2,400 with an alternative penalty of deprivation of liberty in case of failure to pay the amount of the fine due. In addition to ordering the insertion of the publication of the judgement in the same newspaper, which amounted to EUR 2,758.80, the judge ordered them to pay compensation to the judge for non-pecuniary damage in the amount of EUR 3,000 (see paragraph 16 above). The Court observes that the sanction imposed on the applicants was not the "lightest possible", but was, on the contrary, of some significance, and that no consideration was given to the fact that the written remarks addressed to the judge at stake were not made by lawyers but by interested laypersons which were not parties in the proceedings. The Court recalls that even when the sanction is the lightest possible, such an award of only a "token euro" in damages as in *Mor* (cited above, § 61), it nevertheless constitutes a criminal sanction and, in any event, that fact cannot suffice, in itself, to justify the interference with the applicant's freedom of expression (see *Brasilier v. France*, no. 71343/01, § 43, 11 April 2006). The Court observes that an alternative penalty of deprivation of liberty could also be imposed in case of failure to pay the fine. Such criminal sanctions, by their very nature, will inevitably have a chilling effect (see *Otegi Mondragon v. Spain*, no. 2034/07, § 60, ECHR 2011). It observes that, in the present case, the non-execution of the alternative prison sentence because the fines were paid did not erase the applicants' conviction or the long-term effects of any criminal record (see *Marchenko v. Ukraine*, no. 4063/04, § 52, 19 February 2009; see also *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 112-15, ECHR 2004-XI, where the applicants were sentenced to seven months' immediate imprisonment, among other sanctions; and *Belpietro*, cited above, § 61, where the applicant was given a suspended sentence of four months' imprisonment).

60. Taking into account the particularly narrow margin of appreciation left to the national authorities in such situations (see paragraph 48 above), the Court considers that the applicants' conviction was disproportionate to the aim pursued.

3. Conclusion

61. In view of the foregoing, the Court finds that the criminal conviction of the applicants was a disproportionate interference with their right to freedom of expression, and was not therefore "necessary in a democratic society" within the meaning of Article 10 of the Convention.

62. Accordingly, there has been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. 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

64. The applicants claimed EUR 6,779.40 each in respect of pecuniary damage. This amount corresponds to the amount of EUR 2,400 each of them was sentenced to pay as a fine, EUR 3,000 for the compensation to the judge for non-pecuniary damage, and EUR 1,379.40 each for the publication of the judgment

65. The Government contested the claim.

66. The Court notes that the applicants suffered pecuniary losses on account of the amounts they were ordered to pay to the judge. It awards each of the applicants EUR 6,779 in respect of pecuniary damage

67. As regards non-pecuniary damage, the applicants claimed EUR 30,000 each.

68. The Government considered the amount claimed to be excessive.

69. Ruling in equity, the Court considers that in the circumstances of the case the applicants should be awarded EUR 6,000 each in non-pecuniary damages.

B. Costs and expenses

70. The applicants also claimed EUR 3,341.26 each for the costs and expenses incurred before the domestic courts, including EUR 605 each for their *amparo* appeal. They made no claim for the costs incurred before the Court.

71. The Government contested the claim.

72. 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 to defend himself from the violation alleged and are reasonable as to quantum. In the present case, having regard to the documents in its possession and the above criteria, the Court considers it reasonable to award each applicant the sum of EUR 3,341 for the proceedings before the ordinary domestic courts and before the Constitutional Court.

C. Default interest

73. 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. *Decides*, unanimously, to join the applications;

2. *Declares*, unanimously, the applications admissible;

3. *Holds*, by five votes to two, that there has been a violation of Article 10 of the Convention in respect of each of the applicants;

4. *Holds*, by five votes to two,
   (a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 6,779 (six thousand seven hundred and seventy-nine euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (iii) EUR 3,341 (three thousand three hundred and forty-one euros), plus any tax that may be chargeable, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 9 March 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova	Paul Lemmens
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Elósegui and Serghides is annexed to this judgment.

P.L.
O.C.

JOINT DISSENTING OPINION OF JUDGES ELÓSEGUI AND SERGHIDES

I. INTRODUCTION

1. As paragraph 1 of the judgment indicates, this case concerns the alleged violation of the applicants' right to freedom of expression because of their criminal conviction for the publication of an open letter in a local newspaper, complaining of the conduct of a judge in proceedings affecting them although they were not parties to those proceedings.

We are writing a dissenting opinion in this case because we cannot agree with the majority of our colleagues either as to their reasoning or as to their conclusion. As we will explain in the following paragraphs the outcome of this case should have been that there had been no violation of Article 10 of the Convention and that the domestic courts had conducted a proper balancing exercise between the rights in conflict, prioritising the right to honour or the right not be defamed of the person (judge) who was criticised by the two applicants.

II. THE JUDICIAL CONTEXT OF THE CASE

2. To arrive at this conclusion it is necessary to expand on the context of the judicial dispute. The case is concerned only with the criminal proceedings brought against the applicants. However, the open letter by the applicants criticised the judge who had taken a decision in the administrative proceedings, and the criminal courts found that their allegations had lacked sufficient factual basis (see also, especially, the Spanish Constitutional Court judgment). That is why we should know what exactly the first-instance administrative court decided with respect to the allegations that were made against the judge in the open letter (and in particular the assessment of the two expert reports). Hence, the administrative proceedings provide the context for the criminal proceedings (see extracts from the administrative court judgment[1]). In the latter

[1] "Section 60.4. of Law 7/2006 states that '[a]ctivities that are subject to the environmental impact assessment procedure shall not be subject to the environmental approval regulated in this Title". Section 24 of the same legal text states as follows: 'Projects, whether public or private, consisting of the execution of works, installations or any other activity included in Annex II of this Law, which are intended to be carried out in the territory of the Autonomous Community of Aragon, shall be subject to environmental impact assessment, in the manner provided for in this Law and other applicable regulations'. It is specifically discussed during this process whether the project in question is included in the aforementioned Annex II, Group 2, points 1, 2 and 3. Group 2 extractive industry projects comprise '[m]ines and excavation sites covered by the same authorisation or open-pit concession of mineral deposits and other geological resources of sections A, B, C and D whose use is regulated by the Mining Act and supplementary regulations, when any of the following circumstances apply: (1) holdings in which the affected land area exceeds 25 hectares; (2) farms that have a total earth movement of over 200,000 cubic metres per

judgment the question under debate was a technical question, of the kind which must be resolved using objective criteria, based on professional

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year; (3) mining operations that are carried out below the water table, taking as a reference level the highest among the annual oscillations, or that may entail a decrease in the refilling of superficial or deep aquifers'. …

The municipal council based its decision on the report of 31 March 2008, in the administrative file on pages 199 to 206, and its subsequent ratification at the administrative headquarters, prepared by the architect Mr I.Z., who ratified it as a judicial expert. At the request of the appellant, a judicial expert report was prepared which refuted the report of Mr I.Z. [The council therefore] opted for the conclusions of the judicial expert and mining engineer, Mr M.A. (see report, pages 271 to 305), in view of [the experts'] respective degrees and the subject matter of the expert report, taking into account Article 144 of Royal Decree 2857/1978 approving the Mining Regulation, which provides as follows: 'To provide expertise on administrative files processed in matters related to the Mining Act, the qualifications indicated in the previous article will be required, in the field of the experts' respective competencies and with the specialities indicated therein', which do not include architecture. Furthermore, the decision was based on the clarity, coherence and forcefulness of the explanations in the written report and in the minutes of the proceedings. [A further factor was the expert's] greater impartiality, due to his appointment by the court and the lack of any connection with the proceedings, whereas Mr I.Z. is the father of the spokesperson for the Aguilar Natural Platform, has spoken out against the proposed mining operation, and prepared his report at the express request of the municipal council. This raised doubts about the procedure to be followed, despite the initiation of the environmental approval procedure and a favourable report having been issued by the municipal technicians, concluding that the planned activity was compatible with urban planning policy and municipal ordinances. …

It has been proven that the affected land area does not exceed 25 hectares. Mr I.Z. affirms that in the project there are various contradictory figures regarding the surface area, and concludes that the affected land exceeds 25 hectares. In contrast, the report by Mr M. makes clear that the total surface area affected by the extractive activity is 23.88 hectares, corresponding to the perimeter of the works, which is the area allocated by the promoter to the extraction work. This should not be confused with the concession perimeter of 49.04 hectares, which refers to the total area of mining grids authorised under the concession agreement, according to the unit of measurement in section 75 of the Mining Act (Law 22/1973). Such data, the judicial expert asserts, are clearly contained in the memorial and plans submitted by the appellant, which distinguish the perimeter of the concession from that of the workings. Likewise, it has been proven that the earth movement is not more than 200,000 cubic metres per year. The judicial expert stressed the need to convert tonnes into cubic metres to make the calculation, starting from the real density of the material in the area. To do this, he extracted samples from the existing surveys and sent them to an independent laboratory, accredited by the Government of Aragon, applying coefficients to the result in the terms set out in his report and clarified at the hearing, in order to minimise possible errors. Taking [data from] our laboratories and warehouses in this way, an annual extraction volume of 134,970.98 cubic metres is obtained. It should be added that the opposite conclusions of Mr I.Z. are based on theoretical data which he claims to have taken from an 'authoritative work' by Mr L.J., a professor of project engineering who testified at the hearing as an expert witness and, agreeing with Mr M., asserts that the density cannot be specified in a theoretical way through a manual, in which only an interval of values can be fixed, and that an analysis is necessary to establish an accurate value. Likewise, he denies having attributed to clay in his manuals the density that Mr I.Z. claims to have taken from the theoretical criteria established by Mr L." (Unofficial translation from Spanish into English).

standards. This has nothing to do with the discussion of subjective ideas or opinions. According to the third argument of that judgment, whether or not the project should be subjected to the environmental impact assessment procedure is debated in this process, as the activity in question is included in Annex II to Law 7/2006 of 22 June 2006 on environmental protection in Aragon, according to the opinion of the municipal council, or is subject to the environmental approval procedure, according to the opinion of the appellant. Depending on that, two different procedures apply.

III. THE SOCIAL CONTEXT OF THE CASE

3. As regards the social context, Aguilar del Alfambra is a small town in Teruel, a province of the Autonomous Region of Aragon. The town has 64 inhabitants. Teruel has problems owing to its lack of industry, and as a consequence people are abandoning the province and going to the neighbouring provinces (and especially to Castellon, Valencia and Saragossa). One of its small industries is clay mining for the manufacture of ceramic tiles. There are several mines in the aforementioned provinces, because they have good clay. In 2004 the company WBB presented a small project to operate open-pit mines in four small towns. In Aguilar de Alfambra the project included the creation of eight new jobs. It passed all the requirements of the experts from the Energy Department of the Government of Aragon (the official document is a resolution of 8 June 2011, published in the Aragon Official Gazette). The project was opened up for members of the public to lodge objections and was published in the town halls.

4. According to the information provided by the applicants, they never lodged any such objections to the project. The association Plataforma Aguilar Natural was set up on 19 April 2008 with the aim of opposing the project (its current website can be found via Google). It has a very small membership of around 100. The association subsequently carried out environmental activities to showcase the landscape and natural heritage of Alfambra, organising excursions for schools and other events. Today it has 122 members (from Teruel, Valencia, Madrid and Catalonia). The applicants themselves have a degree in history. They do not live in the town because they work in other provinces.

5. The project to create the open mine was assessed by different experts from the Government of Aragon and an expert nominated *ex officio* by the administrative judge, among others. An assessment was also conducted by the technicians of the Aguilar del Alfambra municipal council. This assessment was positive and supported the initiative, finding that it was not a source of pollution. It was known to all parties that the original report had been written by the technicians of the municipal council and by a company normally hired by the council, at the latter's request. Later on, the association Plataforma Aguilar Natural was created and started a campaign

against the project. As a consequence, the mayor of the town decided to request another report from an external firm of architects based in Madrid, headed by the architect I.Z., the father of one of the applicants. The Aguilar del Alfambra municipal council, which had initially been in favour, later altered its position as a result of the platform's campaign.

IV. THE LACK OF FACTUAL BASIS FOR THE CRITICISM AND THE LACK OF GOOD FAITH

6. In the present case, the entire letter comments on the judgment and the public hearing at which it was delivered. However, not all the facts described by the applicants are reflected in the administrative judgment, and at times they contradict the judgment. We will take them one by one and then comment on them.

(a) "The judgment shows that you were not interested whatsoever in the technical matters at issue". The judgment details the steps taken by the judge to deal with the technical questions, including gathering the testimony of several engineers and technicians as experts or witnesses.

(b) "You concluded, for no proper reason, that the expert responsible for assessing the project was independent and impartial, by ignoring his technical and methodological deficiencies". The judgment explains how Mr M.A.'s name was chosen from a list of five mining engineers submitted by the Official Association of Mining Engineers. He was appointed in the presence of the parties, with no objections being raised.

(c) "You did not consider whether there could be something dubious in the expertise of somebody who had not set foot in Aguilar and had only used materials and documentation provided by [WBB-SIBELCO]". The judgment also describes how the judge pondered which of the conflicting expert reports she should accept. Mr I.Z., the person whose report was rejected, was eventually heard, although as a witness instead of as an expert.

(d) "You approve the report of a building engineer whose [professional] background is unknown". The author of the report was a mining engineer whose name was submitted by the Official Association of Mining Engineers.

(e) "Furthermore, you discredit the report [of Mr I.Z.] owing to [his] family ties to ... a spokesperson for this platform. It is unacceptable that you hide the fact that the constitution of this platform and the election of its heads took place a long time after the drafting of the report". The official publication of the platform (issue no. 0, spring 2009) alluded to its constitution "in March of last year". The report by Mr I.Z. is dated 31 March 2008.

(f) "You are unaware of the relevant case-law, and what is worse, you outrageously washed your hands of the affair, even though you had

documentary evidence challenging an expert opinion, but you did nothing". As stated above, in her judgment Ms. M.M. describes precisely how she evaluated each piece of evidence and accepted or rejected the facts as presented by the experts and witnesses.

(g) "... under the formal guise of a shaky expert opinion". As stated above, the election of the expert and his qualifications are reflected in the judgment. He was appointed according to the legal procedures, without interference by the judge, and the parties raised no objections. The letter insists that it reflects the facts as they can be inferred from the judgment ("the judgement shows", "you have documentary evidence of this").

7. It thus remains to be examined whether the "factual basis" for those value judgments was sufficient. We cannot subscribe to the majority's view that the expressions used by the applicants had a sufficiently close connection with the facts of the case. We disagree in addition with their interpretation that the applicants' remarks could not be regarded as misleading or as a gratuitous attack and can be inferred from the judgment. The expert report produced by the judicial expert in these administrative proceedings was subjected, at the request of the two plaintiffs, to an investigation by the Teruel provincial prosecutor's office, which obtained from the Attorney General a report on the said expert and his specific performance. The prosecutor's investigation was discontinued[2].

8. Hence, the applicants' criticisms were not expressed at the hearings or in the course of the judicial proceedings. They could have raised legal objections to the administrative process, like any citizen (as this was a public-information process open to everyone) but did not do so[3]. The

[2] See the judgment of the Constitutional Court, pp. 36 and 48.

[3] According to the administrative court judgment: "If, in accordance with the provisions of the previous section, there are no reasons giving rise to the refusal of the licence, the file will be the subject of a fifteen-day public information campaign by means of an announcement in the Aragon Official Gazette and posting on the notice board of the town hall. The opening of the public information process will be notified personally to the immediate neighbours of the proposed location, so that they can object as they deem appropriate. Application data and documentation protected by the confidentiality rules will be exempted from public information. In the same way, reports will be requested from the relevant municipal council services according to the nature of the activity ... 4. The municipal council states in its resolution that the project does not comply with Article 4 of the Regulation on annoying, unhealthy, harmful and dangerous activities, since the real distance in a straight line between the mine and the urban area of the town would always be, according to the provisions of the project itself, less than 2 km, that is, between 1.79 (maximum) and 1.40 (minimum), as added by Mr I. when ratifying the report issued previously. Likewise, Mr I., in ratifying the report, points to 'section 167 of the Aragon Urban Planning Act relating to licences for classified activities, with regard to distance, [which] should be 2 kilometres'. …

5. Regarding the need to have an urban licence and to draft the planning instrument provided for in the land development plan of Aguilar del Alfambra, it is not appropriate to carry out any assessment in this process, given the reviewing role of the courts, and taking into account the fact that the municipal council has not adopted any decision laying down

applicants created the platform at the very time of the granting of the licence and with the aim of opposing it. Although they are not legal professionals, they have university degrees as historians (one is a public servant in the library of a public university) and they have an adequate knowledge of the law. The distribution of the letter within the small community in the area where the local court was located was bound to harm the reputation and professional image of the judge concerned.

V. REQUIREMENT OF VERACITY OF THE INFORMATION

9. In sum, the letter written by the applicants in the present case was a value judgment totally devoid of factual basis. We disagree with the majority, because the letter cannot be regarded as a critique related to the judicial proceedings. The applicants' action was based on their emotional and personal involvement linked to the fact that the father of one of them was rejected as an expert. Not one line of the letter actually relates to environmental questions or technical matters. The phrase "you have demonstrated your partiality and lack of competence" was a mere personal attack without any support in concrete facts. In our view, Article 10 does not protect slander or defamation, still less any expression that constitutes a serious gratuitous attack. The requirement for critical assertions to have some factual basis, especially when we are dealing with scientific questions, does not run counter to freedom of expression; on the contrary, it promotes a marketplace of ideas based on data and serves to counter mere fake news. Moreover, as Judge Wojtyczek suggested in a concurring opinion, "the traditional dichotomy of statements of fact and value judgments should be revised" (see the concurring opinion of Judge Wojtyczek in *Makraduli v. the former Yugoslav Republic of Macedonia*, nos. 64659/11 and 24133/13, 19 July 2018, and his concurring opinion in the case of *Monica Marcovei v. Romania*, no. 53028/14, 28 July 2020).

10. For these reasons the Court should have recognised that the message conveyed by the applicants did not meet the requirements of veracity of the information, as the domestic courts acknowledged. On the basis of all the facts and domestic judgments in the case file, we strongly disagree with the majority when they affirm that the criticism voiced by the applicants amounted to a value judgment with a factual basis. As the Government pointed out, the applicants were not parties to the administrative proceedings, and many of the assertions treated as fact in their open letter

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such requirements, nor have such assessments been produced in support of the impugned decision. The municipal council limited itself in the contested act to indicating that it would be necessary to request [such assessments] once the corresponding environmental impact assessment procedure has been completed, indicating that such a circumstance 'will have to be taken into account for the future'. It is not up to these courts to rule on future matters, given their reviewing role. DECISION The judicial administrative appeal is hereby allowed" (unofficial translation from Spanish into English).

were false. Moreover, mentioning the judge's name in the letter was patently offensive, and the publication of the letter in the *Diario de Teruel* meant that it was disseminated widely and affected the personal and family life of the judge to the greatest possible extent.

VI. THE CASE OF *MORICE V. FRANCE* WAS BASED ON ESTABLISHED FACTS

11. Moreover, this case bears no relation to the case of *Morice v. France* ([GC], no. 29369/10, ECHR 2015). In that case, the lawyer had criticised the judges in a very serious case relating to the murder of another judge. In fact, it was shown that the French judges had been involved in corruption and in trying to conceal evidence relevant to the murder investigation. The applicant's opinions were based on real and established facts (see *Morice,* cited above, § 158). Moreover, in *Morice* the Court stated, in relation to value judgments and facts, that it had to take into account whether there existed a sufficient "factual basis" for the impugned statement, as well as the circumstances of the case and the general tone of the remarks (ibid., § 126), and the need to maintain the authority of the judiciary (ibid., § 128). As regards lawyers who criticise judges, there are certain rules which contribute to the protection of the judiciary from gratuitous and unfounded attacks (ibid., § 134). Lawyers cannot, moreover, "make remarks that are so serious that they overstep the permissible expression of comments without a sound factual basis ... nor can they proffer insults" (ibid., § 139). Furthermore, "[t]he Court assesses remarks ... [in order] to ensure that the expressions used have a sufficiently close connection with the facts of the case ..." (loc. cit.).

12. By contrast, the applicants in the present case cast doubt on the professional capacities of the administrative judge, accusing her of ignorance and of deliberately intervening to favour the other party in the case by ignoring relevant witnesses and evidence. The applicants' conduct went beyond the limits of criticising a judgment and turned into personal denigration of the judge. Comparing the facts as set out in the letter drafted by the applicants with the facts as established by the administrative judge whom they had criticised, the criminal courts concluded that there was no evidence of the facts described by the applicants in their letter, and that those alleged facts contradicted the established facts. Given the circumstances of the case, it was necessary for the domestic courts to ensure that the judge's right to privacy prevailed over the applicants' right to freedom of expression.

VII. THE CRITICISM OF LACK OF PROFESSIONALISM AFFECTED PRIVATE AS WELL AS PUBLIC LIFE

13. We cannot see that the letter criticising the judge affected only her professional life. To describe someone as being partial, among other failings, also affects his or her integrity as a person. In the concrete situation of this case, our judgment should have respected the conclusion of the domestic courts that the judge's right to privacy (encompassing her professionalism) should prevail over the applicants' right to freedom of expression in this particular case. In accordance with the principle of the margin of appreciation, our Court should have respected the balancing exercise performed by the national courts. If we look at the criteria applied by the Court in balancing free speech criticising judges or the judiciary against competing rights, we see that the Court usually refers to the following criteria: the subject matter (public interest), the manner of expression, the motive, the context of the speech, the fact that the speech should not be devoid of factual grounds (see *Kudeshkina v. Russia*, no. 29492/05, § 95, 26 February 2009, and *Belpietro v. Italy*, no. 43612/10, § 48, 24 September 2013) and must be supported by information, the gravity of the interference, and the chilling effect. In our opinion, the domestic courts took into account all these factors and performed a proper balancing exercise, and the Court should not substitute its own view for theirs.

14. The Spanish domestic courts did not state at any point that personal attacks on individuals were not protected by freedom of expression. It is necessary to read carefully the arguments of the three levels of jurisdiction, namely criminal judge no. 1 of Teruel, the Teruel *Audiencia Provincial* and, especially, the Constitutional Court (see paragraphs 20-24 of the judgment). In the view of the domestic courts, the attacks were gratuitously offensive and went beyond the legitimate right to criticise.

VIII. SERIOUS GRATUITOUS ATTACK

15. Concerning the allegation that M.M. was a "biased", partial and incompetent judge, we share the view of the *Audiencia Provincial* that those value judgments "[went] beyond the legitimate right to criticise". The criticism implied that the judge in question had disregarded the ethical obligations inherent in judicial office, or had even committed a criminal offence. The adoption by a judge of a deliberately erroneous decision could constitute an abuse of authority. In any event, the open letter alleged that Judge M.M. did not have certain qualities which characterise the exercise of judicial activity, such as impartiality in evaluating expert reports and witness statements, and that she had not been interested in the technical aspects of the case before her. We also share the view of the domestic courts that the applicants' allegations of misconduct on the part of M.M. were

based only on the fact that the judge had decided the case in favour of the company WBB, whose interests were not shared by the environmental platform which the applicants represented (see, *mutatis mutandis*, *Peruzzi*, *v. Italy*, no. 39294/09, § 60, 30 June 2015, and contrast *Morice*, §§ 156-61).

IX. ARTICLE 8 AND ARTICLE 10: THE TWO RIGHTS MERIT EQUAL RESPECT

16. As the Court has stated many times, in cases such as the present one, which call for a fair balance to be struck between the right to respect for private life and the right to freedom of expression, the adjudication of the application should not, in principle, vary depending on whether it has been lodged under Article 8 by the person who has been criticised or under Article 10 by the person who has been critical. In principle, the two rights merit equal respect. Accordingly, in principle, the margin of appreciation should be the same in both cases. If the striking of a balance by the domestic courts is consistent with the criteria established by the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.

X. PROPER BALANCING BY THE DOMESTIC COURTS

17. In our view, there are clearly no such reasons in the present case (see *Peruzzi*, cited above, § 65, and the references therein). The judgment of the Teruel *Audiencia Provincial* clearly stated that the value judgments concerning the administrative judge, who was described in the applicants' letter as "unjust, ignorant and biased", had gone beyond the legitimate right to criticise and disagree with a judicial decision. Moreover, in striking a balance between the rights concerned and applying these general principles to the applicants' case, the Spanish Constitutional Court considered, taking into account the Court's case-law, that criminal judge no. 1 had broadly analysed the conflict between the applicants' freedom of expression and respect for the judge's honour, and the Constitutional Court concluded that there had been serious defamation of the judge, exceeding the permissible limits of the right to freedom of expression. In sum, we consider that the Constitutional Court carried out a proper balancing exercise, taking into account all the interests involved.

18. Having regard to the above considerations, the majority could have considered, but did not, that the reasons advanced by the domestic courts in support of their decision were "relevant and sufficient", and that the interference was not disproportionate to the legitimate aim pursued. The interference could thus reasonably be considered "necessary in a democratic society" within the meaning of paragraph 2 of Article 10 of the Convention. Therefore, in our view, our Court did have not serious reasons to substitute its own assessment for that of the domestic courts, which examined the

question at issue with care and in line with the principles laid down by the Court's case-law. Accordingly, we are of the opinion, dissenting from the majority, that there has been no violation of Article 10 of the Convention in this particular case. We would point out that in *Morice* (cited above, § 124), referring to *Animal Defenders International v. the United Kingdom* ([GC], no. 48876/08, § 100, ECHR 2013 (extracts)), the Court stated as follows:

> "(iii) The Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts".

To the best of our knowledge, the reasoning of the domestic courts applied the case-law standards and those courts carried out a correct assessment based on the relevant facts.

XI. DISCREDITING THE JUDICIARY WITHOUT FOUNDATION, AND THE RULE OF LAW

19. The role of the judiciary is intertwined or intrinsically associated with the rule of law; it can be said that the former is an aspect of the latter. Consequently, discrediting the judiciary without any factual foundation goes against the independence of judges, the separation of powers and the rule of law in general, and, therefore, not only fails to contribute to the very foundation of democracy, but actually undermines that foundation.

This is exactly what happened in the present case, in which a judge was discredited as regards the exercise of her judicial duties, without any factual or legal foundation, thus causing damage to her reputation.

In weighing up the applicants' rights under Article 10 on the one hand, against the judge's private and professional life under Article 8 on the other, regard must also be had to the fact that: (a) the judge's right was intrinsically associated with the rule of law, which also needed protection, and (b) the unfounded attack against the judge was also an unfounded attack against the rule of law.

The rule of law underlies every Convention provision, including of course Articles 8 and 10. Likewise, the principle of effectiveness is a predominant or underlying Convention principle. This principle requires that, in the present case, for the Article 8 right of the judge in the exercise of her judicial duties to be practical and effective, she must not be offended or disrespected by anyone without factual foundation, because in such a case not only that right but also the rule of law would be violated.

XII.PROPORTIONALITY OF THE SANCTIONS

20. As to the proportionality of the sanctions, these appear to us quite moderate given the seriousness of the applicants' allegations, the harm caused to the judge's reputation, and the fact that the applicable maximum

fine under the Criminal Code was 420 day-fines (which corresponds to 3,360 euros (EUR)). The applicants were only sentenced to a daily fine of EUR 8 for a period of ten months (300 day-fines, corresponding to EUR 2,400), with an alternative penalty of deprivation of liberty. It is important to observe that the other amounts which they were ordered to pay did not entail an alternative penalty of deprivation of liberty in the event of non-payment. Therefore, we dissent also as regards the conclusion of the majority, because the sanctions imposed, although of a criminal nature, cannot be considered disproportionate in the circumstances of this particular case. Moreover, it is for the national judge to calculate the amount depending on the incomes of the persons involved. The applicants were both professionals, one of them a civil servant with an above-average salary.

XIII. CONCLUSION

21. The domestic courts applied the criteria laid down in the Court's case-law and carried out a proper balancing of the two rights in conflict. The Court must respect States' margin of appreciation, in accordance with the Interlaken, İzmir and Brighton Declarations. On the one hand, as Judge Elósegui pointed out in her dissenting opinion in *Rashkin v. Russia* (no. 69575/10, 7 July 2020), the Court has been much criticised by academia for not respecting this margin, this being seen as evidence of double standards. By contrast, in other cases, a tendency can be observed to grant protection under Article 10 to defamation and slander lacking any factual basis and contravening the domestic criminal codes of most of the 47 Contracting States. However, defending defamation does not contribute to pluralism and democracy. Although use of the criminal law is the *ultima ratio*, that does not mean that the criminal law should not be used in order to limit slander, insults, grossly gratuitous attacks and racial discourse. That is a matter falling within the States' margin of appreciation.