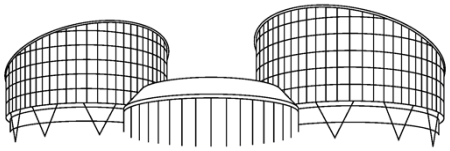

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF KOULIAS v. CYPRUS

(Application no. 48781/12)

JUDGMENT

Art 6 § 1 (civil) • Impartial tribunal • Opponent's lawyer being a founding partner of the law firm at which the judge's son had been working • Lack of objective impartiality • Factors to be taken into account when a judge's relative is involved in a case, including in small jurisdictions

STRASBOURG

26 May 2020

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 Koulias v. Cyprus,

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

Paul Lemmens, *President,*
Georgios A. Serghides,
Dmitry Dedov,
Alena Poláčková,
María Elósegui,
Gilberto Felici,
Lorraine Schembri Orland, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application against the Republic of Cyprus lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Cypriot national, Mr Zacharias Koulias ("the applicant"), on 23 July 2012;

the decision to give notice to the Cypriot Government ("the Government") of the complaints concerning impartiality under Article 6 § 1 of the Convention and freedom of expression under Article 10 of the Convention and to declare the remainder of the application inadmissible;

the parties' observations and the additional factual information submitted by the Government on the code of judicial practice;

Having deliberated in private on 28 April 2020,

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

INTRODUCTION

The case concerns defamation proceedings brought against the applicant, who complained under Article 6 § 1 of the Convention of a lack of impartiality on the part of the presiding Supreme Court judge in the appeal proceedings and under Article 10 of the Convention of a violation of his right to freedom of expression.

THE FACTS

1. The applicant was born in 1950 and lives in Larnaca. He was represented by Andreas S. Angelides L.L.C, a firm of lawyers practising in Nicosia.

2. The Government were represented by their Agent, Mr C. Clerides, Attorney General of the Republic of Cyprus.

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

I. BACKGROUND TO THE CASE

4. The applicant is an advocate and a Member of Parliament of the Republic of Cyprus.

5. On 26 May 2006, during a live political talk show entitled "First Programme" ("*Proti Ekpompi*" – "*Πρώτη Εκπομπή*") on Radio Proto (*Ράδιο Πρώτο*) the applicant made, *inter alia*, certain remarks about another politician, Mr C.Th., a former minister and high-ranking member of a political party. In particular, in so far as relevant, he stated:

> "From what I carefully heard from colleagues of the Democratic Rally party, I say the following. What was the first act of this man? To visit whom, if you please? The leader of the occupied area. A significant personality for our national cause. So I say unequivocally that it is a stab in the back to the national cause of our country and our people. Because he is a man who governed the country for ten years. A man who immediately after the elections in which the party to which he belonged and [which] led [the campaign] promoting party loyalty so that people supported it and which received 30.6% of the votes – what was his first political act? To visit whom? The occupation leader in the so-called presidential palace. And this is really a stab in the back for the laws and rights of our people. That is to say, only naive people cannot understand the political messages imparted by this unacceptable act, and indeed who was he accompanied by? By Mr C.Th. who, to remind you incidentally, recently received a respectable sum of 7,000 Cyprus Pounds from a Turkish company and the next day went to a television station and stated that there was no pseudo-state. And I also want to note that this in essence constituted an up-grade of the pseudo-state which the English and the Americans seek. By whom? By our own people. And this constitutes huge support for Turkish intransigence. Why should the Turks change their positions when our own people and especially people who hold office with the approval of our people hold these views? That is to say, if we were in the position of the Turks, would we change our views? Namely, when you see people who acted in this way and swore on the Holy Bible that the Annan plan be accepted because it was manna from heaven, they would have to be crazy to change their attitude and positions.
>
> And let me say something more. The people who applied to UNOPS for financial aid, such as Mr S., were those whom party loyalty in DISY rewarded so that they received the most preference votes. These are the messages received by the Turks, and the Turks know their job very well. And I think now the responsibility has to be emphasised of all these people who, due to their naivety, believe that party loyalty is above the interests of the country and the people. We must first preserve the party and let the country go where it will. And become Turkish. And when Mr C. went accompanied by Mr T. and his daughter yesterday, he certainly went also accompanied by all these thousands of votes received by these gentlemen. It is a very sad development."

A. Defamation proceedings

6. C.Th. brought an action for defamation against the applicant before the District Court of Nicosia (civil action no. 3775/06) under section 17 of the Civil Wrongs Act (Cap. 148). His complaint focused on two of the applicant's remarks: the allegation that he had received money from a

Turkish company; and the remark about his position with regard to the "pseudo state":

> "That is to say, only naive people cannot understand the political messages imparted by this unacceptable act, and indeed who was he accompanied by? By Mr C.Th. who, to remind you incidentally, recently received a respectable sum of 7,000 Cyprus Pounds from a Turkish company and the next day went to a television station and stated that there was no pseudo-state".

7. On 30 June 2008 the District Court dismissed the action and made an order for costs against the plaintiff. It held that the two remarks in question were not connected and were not defamatory of the plaintiff, whether considered together or separately. Despite that finding, for reasons of completeness the court also examined the applicant's defence of "fair comment", which it allowed. Although the applicant had initially also pleaded the defences of justification (truth) and qualified privilege (see paragraphs 30-31 below), he did not pursue them.

8. The plaintiff lodged an appeal before the Supreme Court (civil appeal no. 297/08). The appeal was heard by a bench of three judges.

9. Following the submission of written observations by the parties but prior to the hearing of the appeal, the appellant changed lawyer.

10. During the hearing a question arose concerning the scope of the case and, in particular, the defence of fair comment.

11. The verbatim record of the appeal hearing on 24 June 2011 reports, in so far as relevant, the following exchange (translation):

> "Appellant's lawyer: I move on to the next point, which is that of fair comment. The first-instance court stated that it was not defamatory. For my submissions to be complete I will deal with the defence of fair comment. However, fair comment presupposes a comment. We have to have a comment and then we examine whether this is fair within the meaning of the law. Here, is there anything in the contested sentence that could possibly be characterised as a comment? Or maybe in reality, the case in any event comes down to whether (καταλήγει) it is defamatory or not. If you agree with this...
>
> Court: It is Mr A [the applicant's lawyer] who has to agree in order to remove this matter from the discussion...
>
> Applicant's lawyer: Of course, honourable Mr President, we have isolated a sentence from the whole picture...
>
> Court: You are the ones who are mostly seeking the isolation.
>
> Applicant's lawyer: Indeed. Here is a sentence, from everything that Mr K said, that Mr C.Th had taken money from a Turkish company.
>
> Court: The second [phrase] is that the next day he said that thing...
>
> Applicant's lawyer: It was not the next day, but anyway...
>
> Court: Even if there were some days' difference, is this a comment?
>
> Applicant's lawyer: I could accept it in the way the court has put it.

Court: Consequently, in light of this correct, in our opinion, agreement of the two parties, it is clarified that the subject matter of the trial is whether the sentences in question, on their own or in association with each other, in light of the innuendo that they conceal, are defamatory. If they are defamatory, the appeal has to succeed and there is no issue of examining the alternative position of fair comment. If not, the appeal will fail.

Applicant's lawyer: I agree

Appellant's lawyer: I agree

...

Court: The gist of the [first-instance] court's judgment that is now the subject matter of the appeal, following the limitation of the contested issues which took place beforehand, is whether the words that had been used were, in themselves or in association with each other are, in light of the innuendo, defamatory. Nothing else.

....

Applicant's lawyer: I have to observe that we support the [first-instance] judgment, following today's suggestions and the limiting of the examination of the issues before you. [The judgment] was absolutely correct based on the evidence that was before the court and also on the basis of its discretionary power to decide, which it had a duty to judge if these, which are claims of defamation, were indeed defamation. In our opinion no defamation exists.

...".

12. On 24 January 2012 the Supreme Court gave judgment upholding the appeal.

13. It first noted that during the hearing of the case the main issue for examination was whether the remarks had been defamatory. Following an agreement by the parties on that matter, the relevant grounds of appeal concerning fair comment were not pursued.

14. The Supreme Court held that the act of receiving money attributed to the appellant and his appearance on television could only be characterised as one act and not as two, as found by the first-instance court. The innuendo inferred from the language used could give rise to separate legal proceedings, based on an extended interpretation of the words used, possibly combined with other circumstances which would have to be proved. Consequently, the main issue in the case was not the meaning of the language used in relation to the actions attributed to the plaintiff, but whether it was justified to link the two remarks made by the applicant. The Supreme Court ruled that the combination of both the above-mentioned actions, together with the words used and the synthesis made by the applicant, left no room for any interpretation other than the implication that the plaintiff/appellant had acted as alleged after receiving money from the Turkish company. Such conduct, in the context of the situation in Cyprus, the Turkish invasion and occupation of the northern part by Turkish troops, could create in an average reasonable reader, in the absence of any other reference, feelings of hatred, contempt and derision of the

plaintiff/appellant. The Supreme Court concluded that the remarks were defamatory of the plaintiff.

15. As the trial court had not made a finding on the issue of damages, the Supreme Court remitted the case for a fresh hearing by another trial judge on the award of damages.

B. Subsequent developments

16. After the judgment of the Supreme Court had been given, the applicant discovered that the appellant's new lawyer (see paragraph 9 above) was the founding partner of the firm for which the son of the presiding judge on the Supreme Courts' bench, Judge G.C., worked.

17. On 10 February 2012 the newspaper *Phileleftheros* published an article on the case, in which the applicant's lawyer stated that either the judge or the lawyer in question should have revealed the connection between them, as this raised the issue as to whether Judge G.C. should have been excluded from the case.

18. On 14 February 2012 the Supreme Court issued a statement through the Cyprus News Agency:

> "Prompted by the article in the newspaper 'Phileleftheros' dated 10/2/2012, the Supreme Court announces that the matter of the relationship between judges [and] lawyers for the purpose of adjudicating cases is settled and regulated by judicial practice and that the participation of the judge in the adjudication of the case referred to in the article was fully in accordance with the relevant judicial practice in force over the years."

II. PROCEEDINGS CONCERNING THE AWARD OF DAMAGES (CIVIL ACTION No. 3775/06)

19. On 23 January 2013 the District Court of Nicosia awarded the plaintiff 25,000 euros (EUR) in damages for defamation, together with statutory interest payable from the date of the lodging of the action until payment. It also awarded the plaintiff costs.

20. On 22 February 2013 the applicant lodged an appeal with the Supreme Court (civil appeal no. 79/13). In accordance with the latest information received, those proceedings are still pending.

III. OTHER RELATED PROCEEDINGS BROUGHT BY THE APPLICANT

21. It appears that the applicant has brought proceedings contesting the costs awarded by the first-instance court. No more information has been provided concerning these proceedings.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. EXEMPTION OF JUDGES

22. The relevant domestic law and practice are set out in detail in the Court's judgment in the case of *Nicholas v. Cyprus*, no. 63246/10, §§ 13-17, 9 January 2018.

23. Following the adoption of the above-mentioned judgment, the code of judicial practice was amended by a decision delivered by the Supreme Court on 8 March 2018. The amendments provide that a judge, whether sitting alone or as a member of a bench, cannot hear a case in which a party is represented by a lawyer who is a member of the "family of the judge". Family is defined as parents, spouses, children, children's spouses, siblings, siblings' children and siblings' spouses and persons with whom a judge has a spiritual relationship (*πνευματική συγγένεια*), the relationship of father-in-law and son-in-law/daughter-in-law, and the relationship between fathers-in-law (*σχέση πεθερού-γαμπρού/νύφης ή συμπεθέρου*). Furthermore, if a lawyer is the employer, employee or partner, or has a professional relationship with a lawyer who is a family member of a judge, including a trainee lawyer, the judge should inform the parties to the proceedings of all the relevant facts. In such a situation, if an objection is raised concerning the judge's participation in the hearing of the case, the judge then decides if he or she will recuse himself or herself or not, in light of the relevant case-law, including the recent case-law of the Court. The Supreme Court referred in this connection to the Court's judgments in *Nicholas,* cited above*,* and *Ramljak v. Croatia* (no. 5856/13, 27 June 2017). If no objection is made and the judge does not consider that there are grounds for his or her recusal, he or she is free to continue hearing the case. This judicial practice does not apply when the court appearance concerns minor matters (*τυπικών εμφανίσεων*).

24. Further amendments were made by decisions delivered by the Supreme Court on 28 January and 11 February 2019. They provided, *inter alia,* that a judge, whether sitting alone or as a member of a bench, cannot hear a case in which a party is represented by a lawyer who is a member of the "family of the judge" and where the lawyer is an employer, employee or partner, or works under the same "professional roof" (*επαγγελματική στέγη*) with that lawyer. This judicial practice does not apply when the court appearance concerns minor matters in cases before the full bench of the Supreme Court consisting of at least seven judges. The amendments have no retrospective effect on cases where the hearing has commenced and is still continuing; and/or cases in which the issuance of a judgment is pending.

II. FINALITY OF DOMESTIC JUDGMENTS

25. The relevant domestic law and practice are set out in detail in the Court's judgment in the case of *Nicholas* (cited above, §§ 18-23).

26. In addition, the following domestic case-law was relied on by the applicant.

27. In *Achilleas Korellis* (case no. 53/99 concerning civil appeal no. 10277 – *certiorari* appeal) the Supreme Court, sitting as a full bench on 19 July 1999, dismissed by majority an application to annul the appellate court's judgment on grounds of the alleged objective partiality of one of the judges on the appeal bench. It held that it did not have inherent jurisdiction to annul or amend a judgment, as this would constitute third-instance jurisdiction, which neither the Constitution nor domestic law allowed for. Three justices dissented, considering that the Supreme Court had inherent jurisdiction to set aside the appeal judgment if it was subsequently ascertained that a judge should not have participated on the grounds of objective partiality.

28. In the case of *Ierotheos Christodoulou alias Ropas v. The Republic of Cyprus (*criminal appeal no. 3/2009, judgment of 10 May 2010 (2010) 2 C.L.R 226), the Supreme Court dismissed an application by which the defendant had requested the reopening of appeal proceedings on the basis of newly discovered evidence. It held that it did not have inherent jurisdiction to do so and reopening would be tantamount to exercising third-instance jurisdiction, which it did not have. Referring to the case of the *Educational Service Commission v. Zena Poulli* (see *Nicholas*, cited above, § 22) it ruled, *inter alia*, that following the conclusion of a trial and the issuing of a judgment, reopening could only take place in cases where, for example, an interested party had not been notified of the procedure.

29. In its judgment of 14 June 2013 in the case of *Kayat Trading Limited v. Genzyme Corporation (no. 3)* (civil appeal no. 58/2012, (2013) 1 B C.L.R 1263), the Supreme Court dismissed an application to set aside a judgment given on appeal on alleged grounds of a breach of the rules of natural justice and an unfair trial. It held, *inter alia*, that in the circumstances there had not been a violation of the rules of natural justice in the trial and therefore the principles outlined in the *Zena Poulli* case (cited above) were not applicable.

III. DEFAMATION

A. Legislative provisions

30. Section 17(1) of the Civil Wrongs Law (Cap. 148) defines defamation as follows:

"Defamation consists of the publication by any person by means of print, writing, painting, effigy, gestures, spoken words or other sounds, or by any other means whatsoever, including broadcasting by wireless telegraphy, of any matter which –

(a) imputes to any other person a crime; or

(b) imputes to any other person misconduct in any public office; or

(c) naturally tends to injure or prejudice the reputation of any other person in the way of his profession, trade, business, calling or office; or

(d) is likely to expose any other person to general hatred, contempt or ridicule; or

(e) is likely to cause any other person to be shunned or avoided by other persons.

For the purposes of this subsection, 'crime' means any offence or other act punishable under any enactment in force in the Republic and any act wheresoever committed, which, if committed in the Republic, would be punishable therein."

31. Section 19 of the above-mentioned law sets out the defences to defamation: (a) justification (truth); (b) fair comment; (c) privilege (absolute and qualified); and (d) offer of amends. In so far as relevant, this section provides as follows:

"In an action for defamation it shall be a defence [if] -

(a) ... the publication about which the complaint was made was true:

provided that where the defamatory publication contains two or more distinct charges against the plaintiff, a defence under this paragraph shall not fail by reason only that the truth of every charge is not proved, if the part of the publication which has not been proved to be true does not materially injure the plaintiff's reputation having regard to the truth of the remaining charges;

(b) ... the publication of which complaint was made was a fair comment on some matter of public interest:

provided that where the defamatory publication consists partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is a fair comment, having regard to such of the fact alleged or referred to in the defamatory publication for which the action was brought are proved:

provided further that a defence under this paragraph shall not succeed if the plaintiff provides that the publication was not made in good faith within the meaning of subsection (2) of section 21 of this Law;

...".

B. Domestic case-law relied on by the Government

32. In the case of *Kimargo Fishfarming Ltd v. Panteli Metaxa* (civil appeal no. 16/2008, (2011) 1 C.L.R 218, judgment of 10 February 2011), the Supreme Court upheld the first-instance court's ruling that a defamatory statement made by the plaintiff about an issue of public interest was covered by the defence of fair comment. When examining whether the lower court's approach to the defence of fair comment had been justified, the Supreme

Court noted that it was difficult to balance the right to freedom of expression and the right to reputation. It concluded that in parallel, however, in a democratic society free dialogue should be encouraged, especially on issues of public interest such as those raised in that case (the environment, and in particular the sea). The Supreme Court found that the appellant company's contention that the protection of its reputation should have led to the rejection of the defence could not be sustained, as protecting someone's reputation should not contravene freedom of expression; a sense of proportionality was required.

33. In the case of *Ekdoseis Arktinos v. Dorou Georgiadi* (civil appeal no. 118/2008 (2011) 1 C.L.R 407, judgment of 4 March 2011), the Supreme Court reversed the first-instance court's finding and held that a defamatory statement made by the plaintiffs/appellants about an issue of public interest was covered by the defence of fair comment. In analysing whether the defence of fair comment was applicable, the Supreme Court noted that "the right to a fair comment is one of the basic rights of oral and written free speech and is of vital importance for safeguarding the right upon which our personal freedom is based".

34. In the case of *Makarios Droushiotis v. Nikola Papadopoulou* (civil appeal no. 54/2008, (2012) 1 C.L.R 102, judgment of 30 January 2012), the Supreme Court reversed the first-instance court's finding and held that a defamatory statement made by the defendant/appellant in relation to an issue of public interest was covered by the defence of fair comment. The Supreme Court noted, *inter alia*, that even if not all facts were proven, this did not mean that the appellant's/defendant's expression of opinion had not constituted a fair comment based on the facts that had been proven. The Supreme Court concluded that the comments in question had constituted an honest and fair expression of opinion on a matter of public interest (the conduct of public figures). The defendant/appellant, as a journalist, had been under a duty to publish, as it had been a matter of public interest on which the public had to be informed.

35. In the case of *Theofanis Karavias v. Stavros Stavrou* (civil appeal no. 343/2008, (2012) 1 C.L.R 469, judgment of 20 March 2012), the Supreme Court upheld the judgment of the first-instance court, which had ruled that a defamatory statement made by the plaintiff about an issue of public interest had been covered by the defence of fair comment. The Supreme Court concluded that in order for the court to balance the interests of the two parties, it was of vital importance not to discourage the public from expressing its opinion on matters of public interest for fear of penal or other sanctions. It found that the defendant/respondent in the case had expressed his comments in good faith.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

36. The applicant complained under Article 6 § 1 of the Convention that, whether the Court applied the objective or the subjective test, there had been a lack of impartiality on the part of the presiding judge on the Supreme Court bench on account of his relationship with the appellant's lawyer. In particular, following the submission of the parties' written observations but prior to the appeal hearing, the appellant had changed lawyer. The new lawyer was a founding partner of the firm at which the judge's son had been working.

37. Article 6 § 1 of the Convention in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

38. The Government contested that argument.

A. Admissibility

1. Exhaustion of domestic remedies

(a) The parties' submissions

(i) The Government

39. The Government first submitted that according to judicial practice at the time, Judge G.C. had not been under an obligation to recuse himself from the case. It is true that he could have chosen to do so if he had considered for personal reasons that it would not be appropriate for him to sit on the bench. He and the other judges on the bench were not, however, under an obligation to inform the applicant of the said relationship given that the relevant judicial practice did not provide for the recusal of a judge on those grounds and as Judge G.C. had not considered that in the interests of justice it was appropriate to disqualify himself from sitting in the case. The Government referred to the Supreme Court's judgment in the case of *Despo Apostolidou* and to *Nicholas* (cited above, § 17).

40. The Government further submitted that the applicant had failed to exhaust domestic remedies. Under domestic law the possible exemption of a judge could be examined judicially only when the matter was raised by one of the parties concerned. This had not been done by the applicant. Assuming that the applicant had found out about the connection between Judge G.C. and the appellant's lawyer after the Supreme Court had given judgment, it had been open to him to apply for the reopening of the appeal proceedings in the light of the new information he had received about Judge G.C. In this connection, the Government submitted arguments similar to those in

Nicholas (cited above, §§ 30-31) and emphasised that the issue raised by the applicant concerned the right to be heard and/or rules of natural justice and/or the necessary requirements for a court to maintain its character as a court of justice.

41. The Government pointed out that domestic case-law drew a distinction between a case of third-instance jurisdiction and a case based on the inherent jurisdiction of the court. In the latter case, the Supreme Court had jurisdiction to order the reopening of appeal proceedings, whereas in the former case it could not do so. They distinguished the present case from the cases of *Ierotheos Chirstodoulou* and *Kayat Trading* (see paragraphs 28 and 29 above) relied on by the applicant (see paragraph 43 below). The former case did not concern the inherent jurisdiction of the court but an attempt to have access to a third-instance jurisdiction, whereas in the latter case the Supreme Court had found that the rules of natural justice had not been breached and that there were therefore no grounds to reopen the case. The Government further relied on the dissenting opinion of the minority in the case of *Achilleas Korellis* (see paragraph 27 above).

42. Lastly, the Government submitted that the Supreme Court's public statement had been limited to the fact that Judge G.C.'s participation in the case had been in accordance with the judicial practice in force at the time, and did not pass judgment on the correctness of the judge's participation.

(ii) The applicant

43. The applicant submitted that the relationship between Judge G.C. and the appellant's new lawyer had not been disclosed to him by the Supreme Court or the appellant. Once judgment had been given, there had been no remedy available to him for raising the issue of impartiality. The remedy put forward by the Government was unavailable both in theory and in practice. Under domestic case-law the reopening of cases took place when there were procedural, grammatical or clerical errors. This was not the issue at stake in the present case. In *Achilleas Korellis* (see paragraph 27 above), the Supreme Court had dismissed an application seeking to have a judgment annulled and/or set aside on the grounds of alleged partiality. The applicant also relied on the judgments of the Supreme Court in *Ierotheos Christodoulou* and *Kayat Trading* concerning alleged breaches of natural justice. He argued that it was clear from the three cases referred to above that the Supreme Court was not willing to reopen such cases (see paragraphs 28 and 29 above).

44. Furthermore, the Supreme Court, through the press statement made on 14 February 2012 (see paragraph 18 above), had unquestionably and in a very definite manner formed a clear view that the issue of the participation of Judge G.C. had been in accordance with judicial practice. Thus any attempt to reopen the case would have been to no avail. Such a request would have been examined by the same court, which could not have been

independent or impartial as it had already expressed its opinion publicly on the issue in favour of the said judge. Moreover, the bench reviewing such a request would have included Judge G.C., as there had been no procedure in domestic law providing for his withdrawal in order to examine a request for his withdrawal. In addition, the code of judicial practice applicable at the time, which had been binding, had not included the relationship in question as grounds for exemption.

45. Lastly, the applicant emphasised that in accordance with the Court's case-law a request for reopening a case that had been concluded could not normally be considered as an effective remedy for the purposes of Article 35 § 1 of the Convention unless it could be established that under domestic law such a request could be genuinely deemed effective. In the present case, however, the Government had failed to establish that this was so.

(b) The Court's assessment

46. The rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring a case against a State to first use the remedies provided by the national legal system, thus allowing States the opportunity to put matters right through their own legal systems before being required to answer for their acts before an international body. In order to comply with the rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged; there is no obligation to have recourse to remedies which are inadequate or ineffective (see, among many authorities, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 70-71, 25 March 2014, with further references).

47. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one and was available in theory and in practice at the relevant time – that is to say that it was accessible and was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (ibid., § 77). However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her of the requirement (ibid.).

48. In the present case, as in that of *Nicholas* (cited above, § 36), there is nothing to show *in concreto* that the applicant or the lawyer representing him before the Supreme Court were actually aware of the connection between Judge G.C. and the appellant's new lawyer at the time the proceedings were still pending.

49. As regards the Government's claim that the applicant should have lodged an application for the reopening of the appeal proceedings in the light of facts which came to light after the judgment had been given, the Court reiterates its extensive case-law to the effect that an application for a retrial or the reopening of appeal proceedings or for a similar extraordinary remedy cannot, as a general rule, be taken into account for the purposes of applying Article 35 § 1 of the Convention (see *Nicholas*, cited above, §§ 37-38, with numerous references). The Court, in its judgment in the case of *Nicholas*, rejected the same plea of non-exhaustion made by the Government, finding that it had not been established that under domestic law an application requesting the reopening of proceedings on the applicant's appeal on the grounds of alleged partiality of a judge could constitute an effective remedy within the meaning of Article 35 § 1 of the Convention. The Court sees no reason to depart from that finding in respect of the present application, in particular in view of the Supreme Court's judgment in the case of *Achilleas Korellis* (see paragraph 27 above) referred to in the present case. The Court therefore considers that this complaint cannot be rejected for failure to exhaust domestic remedies.

50. It follows that the Government's objection must be dismissed.

2. Other grounds of inadmissibility

51. The Court notes that this complaint 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. The parties' submissions

(a) The applicant

52. The applicant submitted that the presiding judge's son had been working in the firm which had taken over the appellant's representation before the hearing of the appeal. Judge G.C. had not disclosed this relationship during the proceedings. He should have done so and withdrawn from the case, as his relationship with the appellant's new lawyer had jeopardised, or could appear to have jeopardised, the right to a fair trial. The fact that his son had not been a partner did not change anything. In the case of *Ramljak* (cited above) the son of the judge in question had been a trainee. In addition, Judge G.C. had been the only judge who had asked questions during the hearing or had made requests for clarification, consequently tainting the proceedings.

(b) The Government

53. The Government submitted that no issue of subjective partiality had arisen in the case. Nothing in the present case suggested that Judge G.C. had acted with personal prejudice or bias or that his judgment had been in any way impaired. The applicant had not made any specific allegations on this matter or produced any evidence showing personal bias on the part of Judge G.C.

54. Nor had it been shown that the applicant's fears as to lack of impartiality on the part Judge G.C. had been objectively justified. Judge G.C.'s son had worked as junior counsel at the law firm which had represented the appellant. He had not been the lawyer who handled the case before the Supreme Court, nor had he been involved in the case otherwise. Furthermore, he had not been a partner in the law firm. The relationship in question was not of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal, regard being had, *inter alia,* to the judicial practice applicable at the material time, which did not include the relationship in question as grounds for exemption. Relying on *Micallef v. Malta* [GC], no. 17056/06, § 99, ECHR 2009, the Government pointed out that the Court took into account domestic rules regulating the recusal of judges when making its own assessments as to objective impartiality. The present case could be distinguished from that of (i) *Pescador Valero v. Spain*, (no. 62435/00, § 27, ECHR 2003-VII), in which the judge himself had been working as an associate professor at the university (one of the parties to the proceedings) and (ii) *Tocono and Profesorii Prometeişti v. Moldova*, (no. 32263/03, § 31, 26 June 2007), where the judge in question had threatened the school authorities – including the head teacher and teachers who had expelled his son – with retaliation.

55. The Government also drew a distinction between the present case and that of *Ramljak* (cited above) on two grounds: firstly, the law firm in which Judge G.C.'s son had worked was larger, comprising twenty-five lawyers and not only two principal lawyers; and secondly, the code of judicial practice applicable at the time had not covered the relationship in question. In *Ramljak* the Court had taken into account the case-law of the Croatian Supreme Court, which had been inclined to quash judgments delivered by judges whose close relatives worked in the law offices of the parties' representatives.

56. Lastly, regarding the applicant's allegation that the appeal procedure had been tainted on account of the questions put by Judge G.C., the Government argued that during the hearing of a case, judges frequently asked questions and sought clarifications on factual and legal issues.

2. The Court's assessment

57. The Court refers to the general principles concerning impartiality as set out in detail in paragraphs 49-55 of its judgment in *Nicholas* (cited above, with further references).

58. In the present case the applicant's fears of a lack of impartiality on the part of Judge G.C., who sat on the three-judge Supreme Court bench deciding on the appeal, were based on the fact that Judge G.C.'s son had been working in the law firm of which the appellant's lawyer was a founding partner.

59. Under the subjective test, the Court reiterates that the personal impartiality of a judge must be presumed until there is proof to the contrary (see general principles in *Nicholas*, cited above, § 50). The Court notes that nothing in the present case indicated any actual prejudice or bias on the part of Judge G.C.

60. The case will therefore be examined only from the standpoint of the objective impartiality test. More specifically, the Court has to decide whether the applicant's misgivings were objectively justified, given the circumstances of the case.

61. The Court refers to the principles set out in its judgment in the case of *Nicholas* concerning situations in which a judge has a blood tie with an employee of a law firm representing a party in any given proceedings (§§ 62-64). In particular, it reiterates that when a judge has a blood tie with an employee of a law firm representing a party in any given proceedings, this does not in and of itself disqualify the judge. An automatic disqualification on the basis of consanguinity is not necessarily required (ibid., § 62). It is, however, a situation or affiliation that could give rise to misgivings as to the judge's impartiality. Whether such misgivings are objectively justified would very much depend on the circumstances of the specific case, and a number of factors should be taken into account in this regard. These should include, *inter alia*, whether the judge's relative has been involved in the case in question, the position of the judge's relative in the firm, the size of the firm, its internal organisational structure, the financial importance of the case for the law firm, and any possible financial interest or potential benefit (and the extent thereof) on the part of the relative (ibid.).

62. It cannot be overlooked that Cyprus is a small country, with smaller firms and a smaller number of judges than larger jurisdictions; therefore, this situation is likely to arise more often (ibid., § 63), with further references). The Court has observed in its case-law that complaints alleging bias should not be capable of paralysing a defendant State's legal system and that in small jurisdictions, excessively strict standards in respect of such motions could unduly hamper the administration of justice (ibid).

63. Given the importance of appearances, however, when such a situation (which can give rise to a suggestion or appearance of bias) arises,

that situation should be disclosed at the outset of the proceedings and an assessment should be made, taking into account the various factors involved in order to determine whether disqualification is actually necessitated in the case. This is an important procedural safeguard which is necessary in order to provide adequate guarantees in respect of both objective and subjective impartiality (ibid., § 64).

64. As in the case of *Nicholas*, in the present case no such disclosure took place and the applicant discovered the employment connection only after a judgment had been given in respect of his appeal. He was thus faced with a situation in which the son of Judge G.C. worked in the law firm which had taken over representation of the appellant before the hearing of the appeal and whose founding/managing partner, his employer, as in *Nicholas* (§§ 57 and 65) had appeared at the appeal hearing. The applicant did not know whether Judge G.C.'s son had actually been involved in the case and whether he had a financial interest connected to its outcome (ibid., § 65). An appearance of partiality was thus created. The Court therefore finds that the applicant's doubts regarding the impartiality of Judge G.C. on those grounds were objectively justified and that the domestic law and practice did not provide sufficient procedural safeguards in this respect.

65. It is worth noting, however, that the code of judicial practice was subsequently amended (see paragraphs 23 and 24 above) and that the version of the code currently in force stipulates that such an employment connection constitutes grounds for the withdrawal of a judge in cases such as the present one which are not heard by a full bench (see paragraph 24 above).

66. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

67. The applicant complained of a violation of his right to freedom of expression as provided for in 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."

68. The applicant claimed, in particular, that the interference with his right had been neither necessary in a democratic society nor proportionate. He argued that the statements at issue had been made in the context of an important political debate of public interest and concerned a politician who had put himself in a highly controversial situation, exposing himself to criticism over his actions.

69. The Government contested that argument.

A. Submissions by the parties

1. The Government

70. The Government submitted that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention concerning his complaint under Article 10. During the appeal hearing he had withdrawn the grounds of appeal raising the defence of fair comment, which would have given the Supreme Court the opportunity to examine whether the defamatory statement had been covered by the said defence. In doing so the Supreme Court would have proceeded with a balancing exercise between the applicant's right to freedom of expression and the appellant's right to reputation within the parameters of that defence. In domestic law, the defence of fair comment acted as a safeguard for freedom of expression in relation to matters of public interest and could be used as a procedural safeguard to the benefit of a defendant in defamation proceedings. The recognition and safeguarding of that defence essentially sought to ensure the participation of citizens in matters of public interest, through public criticism and comment on persons and situations in relation to matters of public interest, provided that there was no bad faith. It further afforded a defendant in such proceedings the chance to prove that there had been a sufficient factual basis for his or her allegation. Referring to the Court's judgment in *Morice v. France* ([GC], no. 29369/10, § 155, ECHR 2015), the Government argued that according to the Court's case law, being afforded such an opportunity was a factor to be taken into account when assessing the proportionality of an interference under Article 10. In support of their arguments the Government referred to judgments of the Supreme Court in defamation proceedings in which the defence of fair comment had been raised and examined (see paragraphs 32-35 above).

71. The applicant, during the appeal hearing, had withdrawn the defence of fair comment. He had unreservedly agreed with the Supreme Court in delimiting the subject matter of the defamation case and had recapped the situation orally during the hearing. His argument had been that the statement in question had not been defamatory. The Government noted that the applicant had not given a reason as to why he had withdrawn that defence.

72. The Government pointed out that the applicant's arguments overlooked well-settled domestic case-law whereby in a civil action for the tort of defamation, the balancing exercise required by the right to freedom of expression, and especially in relation to matters of public interest, was carried out by the domestic courts when examining the relevant defences to defamation (see paragraphs 32-35 above). His defence of fair comment had actually been upheld by the District Court in its judgment of 30 June 2008. The applicant had therefore made a procedural mistake when he had withdrawn the defence of fair comment on appeal.

2. The applicant

73. The applicant disagreed and submitted that contrary to the Government's submissions, he had fully raised and argued his Article 10 complaint before both the District Court and the Supreme Court, in his written and oral pleadings. He had also raised the defence of fair comment at all stages in the written pleadings; he had only withdrawn that defence when the Supreme Court had intervened seeking a limitation of the issues raised before it.

74. In any event, the fact that the applicant had withdrawn that defence had had no impact on the case as it had not hindered the Supreme Court in examining the substance of the case. In particular, the court had still been able to examine whether the statements he had presented as statements of fact were substantially true on the balance of probabilities and whether any limitation – that is, a finding of defamation – affected the applicant's right to freedom of expression and was proportionate and justified given that the statements had been made in the context of an important political debate of public interest between two political figures. The Supreme Court should have considered the above in deciding whether or not the statements had been defamatory.

75. The applicant emphasised that his position *ab initio* had been that his statements had been true and had not therefore been defamatory. That was still his position. He argued that the finding of defamation had violated his right to freedom of expression.

B. The Court's assessment

76. The Court refers to the general principles concerning exhaustion of domestic remedies, which are set out in paragraphs 46 and 47 above.

77. In the present case, the applicant argued before the domestic courts that the statements he had made about C.Th. during a live radio programme had not been defamatory. Although the applicant had initially pleaded the defences of fair comment, justification (truth) and qualified privilege (see paragraphs 30-31 above), he eventually only pursued the first one at first instance (see paragraph 7 above). The first-instance court found that his

statements had not been defamatory and, in any event, upheld the defence of fair comment. On appeal, however, the applicant withdrew that defence and agreed that the matter to be examined on appeal concerned only whether or not the statements had been defamatory. It transpires from the record of the hearing before the Supreme Court that the appellant's lawyer initially raised the issue whether the issue of fair comment should be pursued, and the Supreme Court explicitly asked the applicant's lawyer's viewpoint on the matter. An exchange ensued which initially was not entirely clear. The Supreme Court, however, then clarified that the subject matter of the trial in view of that exchange would be limited to whether or not there had been defamation and nothing else, and that this would determine the outcome of the appeal. As the Government pointed out, the applicant's lawyer agreed with the court unreservedly on the matter and expressly stated that he was in favour of limiting the issue on appeal to whether there was defamation. As a consequence, the Supreme Court's examination of the case and ruling was limited to that sole issue.

78. As the Government emphasise, domestic law provides for a number of defences in a defamation action, fair comment being one of them. The Government have argued that when examining whether that particular defence was applicable in the case, the Supreme Court would have examined whether there had been a sufficient factual basis for the applicant's statements and proceeded with a balancing exercise between the applicant's right to freedom of expression and the appellant's right to reputation, bearing in mind the context in which the statements were made. The defence of fair comment concerned matters of public interest.

79. The applicant has not provided any explanation for why he agreed to withdraw his defence of fair comment, bearing in mind that his argument was that his statements had been made in the context of an important political debate of public interest and also that this defence had been upheld by the first-instance court. By withdrawing that defence, the applicant clearly narrowed the examination of the case by the Supreme Court and did not place all the Article 10 arguments he is now making before the Supreme Court to enable it to determine these issues. Furthermore, given that his defence was successful at first instance, it cannot be said that the proceedings before the Supreme Court offered him no prospects of success.

80. It is also worth noting, to the extent that the applicant argued that the statements he had made were true and that the Supreme Court ought to have examined that when deciding whether they had been defamatory, that the applicant did not pursue the defence of justification/truth before the domestic courts (see paragraph 77 above).

81. Mindful of those considerations, the Court finds that the Government's objection that the relevant "effective" domestic remedy was not used by the applicant in the instant case is well-founded (see, among

other authorities, *Azinas v. Cyprus* [GC], no. 56679/00, § 41, ECHR 2004-III, with further references).

82. Consequently, the complaint under Article 10 must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. 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

84. The applicant claimed EUR 25,000 in respect of pecuniary damage, plus VAT. This was the amount he had been ordered to pay by the Nicosia District Court following the proceedings on the issue of damages. The applicant also claimed EUR 35,000 in respect of non-pecuniary damage. In particular, he claimed EUR 25,000 for the damage to his good name and reputation and EUR 10,000 for the mental anguish and distress to which he had been subjected over a prolonged period in respect of the violation of his rights under Articles 6 and 10 of the Convention.

85. With regard to the applicant's claim for pecuniary damage, the Government pointed out that the issue of damages was still pending before the Supreme Court. They urged the Court to reject the applicant's claim for non-pecuniary damage as excessive on the basis of its case-law.

86. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, having regard to the violation found under Article 6 § 1 of the Convention, it awards the applicant EUR 9,600 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

87. The applicant claimed EUR 40,000 plus VAT (without specifying the percentage) in total for the costs and expenses incurred before the domestic courts and for those incurred before the Court. He submitted that he had reached an oral agreement with his lawyer that he would pay him that amount in legal fees, including all the expenses incurred to date, irrespective of the outcome of the application. He added that the oral agreement had been updated and the amount increased from time to time, as further work had been required on the part of his lawyer. The agreement had not been put in writing as he was a member of parliament and his good

name and reputation were undisputed. The above amount was broken down as follows: (a) EUR 25,413.66 for costs and expenses incurred in relation to the first-instance proceedings in civil action no. 3775/06, in the appeal proceedings (appeal no. 297/08) and the first-instance proceedings concerning damages; (b) EUR 14,586.34 for the expenses incurred in appeal no. 79/13, in the proceedings contesting the costs awarded by the first-instance court in civil action no. 3775/06, and for the costs and expenses incurred before the Court. The applicant provided certain receipts and bills of costs in relation to the costs and expenses incurred domestically.

88. In addition, the applicant claimed EUR 1,248.20 for out-of-pocket costs in the domestic proceedings and the proceedings before the Court, for which he also provided receipts. Of that amount, EUR 19.20 concerned postal fees for the application before the Court. Receipts were provided adding up to that amount.

89. The Government pointed out that in accordance with the Court's case-law, the applicant could not claim reimbursement of costs and expenses that had (a) not been necessarily incurred to prevent or redress the breach of the Convention found by the Court; (b) were not reasonable as to quantum; (c) were not causally linked to the alleged violation; (d) were not itemised and substantiated by bills and invoices; and lastly (e) had not actually been incurred. The applicant had failed to give any itemised bills or invoices substantiating his claim for EUR 40,000, but relied on an oral agreement. That amount was in any event excessive. Furthermore, some of the costs claimed did not concern proceedings which were the subject-matter of the present application. The only costs that the applicant could claim in relation to the domestic proceedings were those which had been approved by the Registrar (of the Supreme Court) for legal costs incurred in civil case no. 3775/06 and civil appeal no. 297/08; and the costs of the additional first-instance proceedings concerning damages. These amounted to EUR 13,282.88.

90. 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 they were actually and necessarily incurred and are reasonable as to quantum. Rule 60 of the Rules of Court further requires that an applicant submit itemised particulars of all claims, together with any relevant supporting documents.

91. In the present case, to the extent that the applicant has claimed costs and expenses for the domestic proceedings, the Court notes that it has declared the applicant's complaint under Article 10 inadmissible. The domestic proceedings concerned his complaint under that provision. The issue of impartiality during the appeal proceedings only came up following the conclusion of the proceedings in appeal no. 297/08. The additional proceedings were confined to the question of damages to be awarded to the plaintiff for defamation. Thus the costs and expenses incurred by the

applicant before the domestic courts were not incurred in his attempt to seek redress for the violation found by the Court under Article 6 § 1 of the Convention. The Court therefore rejects the claim for costs and expenses in the domestic proceedings.

92. With regard to the applicant's claim concerning costs and expenses before the Court, the applicant has not specified an exact amount but only referred to an aggregate sum which includes other expenses incurred at domestic level. He has failed to submit any supporting documents – such as itemised bills or invoices – substantiating his claim (see *Merabishvili v. Georgia* [GC], no. 72508/13, §§ 370-372, 28 November 2017, with further references). The only receipts provided concern postage fees of documents to the Court amounting to EUR 19.20. Consequently the Court can only award the latter amount.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 9,600 (nine thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 19.20 (nineteen euros and twenty cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

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

Done in English, and notified in writing on 26 May 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Paul Lemmens
Registrar	President