CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 4591/04
by Kjartan GUNNARSSON
against Iceland

The European Court of Human Rights (Third Section), sitting on 20 October 2005 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr V. ZAGREBELSKY,
Mr DAVID THÓR BJÖRGVINSSON,
Ms I. ZIEMELE, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 1 June 2001,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Kjartan Gunnarsson, is an Icelandic national who was born in 1951 and lives in Reykjavik. He was represented before the Court by Mr J.R Möller, a lawyer practising in the same town.

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

On 31 August 2000 the newspaper *Dagur* published an article amidst a heated public debate in the wake of the acquisition of a large part of the shares of the Icelandic Investment Bank by a group, *Orca SA* in Luxembourg, and strong criticism of leaders of the Independence Party, of which the applicant was the Secretary General. The author of the article, an

Advocate named Sigurdur G. Gudjónsson, had advanced the view that members of the general public were not treated equally when at the hands of Independence Party leaders. He recounted events that had occurred in May 1994 when he, a Mr J. O. and several others, had purchased shares in the *Islendska útvarpsfélagid* (the Icelandic Broadcasting Company, hereinafter referred to as "the IBC"). The acquisition created a new shareholder majority in the IBC. Following a change in the IBC's Board of Directors, the *Islandsbanki* had withdrawn a loan offer to, and had in fact broken off with, the IBC. The article further stated that the *Islandsbanki*'s Managing Director and the former Chairperson of its Board of Directors had close family ties and that the Chairperson was a member of the Independence Party's Finance Committee. The article then went on (the two passages in italics were the subject of defamation proceedings brought by the applicant):

> "At this point, we approached *Landsbanki*. The Chairperson of *Landsbanki*'s Board of Directors at the time was [the applicant], Secretary General of the Independence Party and Chairperson of the Broadcasting Licensing Committee, which is concerned with the affairs of independent Broadcasting stations. On 29 July 1994, the IBC received a letter from *Landsbanki*, notifying that it declined to do any business with the IBC. *No explanations were given, but those of us [the respondent and other shareholders] who represented the IBC in the negotiations with the Bank were told that [the applicant] was opposed to Landsbanki's doing business with a company where Mr J. O. was involved*. No formal negotiations took place with the other State owned bank, *Bunadarbanki*, as we were told in informal discussions that it could not take up business with the IBC as some of its shareholders who had lost their majority holdings in the IBC at the share holders' meeting in July were customers of the bank and might be offended if the bank were to assist the IBC or take up business relations with the IBC. Fortunately there were savings banks in Iceland at the time who regarded business with the IBC as being a positive and lucrative option. *Here, decisions regarding business of IBC were made on the basis of interests of the saving banks, not on the basis of what was best for the Independence Party and acceptable to the leaders of the Party's Finance Committee*."

The applicant subsequently brought defamation proceedings against the author of the article, requesting - in addition to compensation - that the following two statements be declared null and void:

> (1) "No explanations were given, but those of us [the respondent and other shareholders] who represented the Company in the negotiations with the Bank were told that [the applicant] was opposed to *Landsbanki*'s doing business with a company where Mr J.O. was involved."

> (2)" Here, decisions regarding business of IBC were made on the basis of interests of the saving banks, not on the basis of what was best for the Independence Party and acceptable to the leaders of the Party's Finance Committee".

The applicant categorically denied as false the allegation that he had played any part in the decision by *Landsbanki* (hereinafter "the Bank") and this was supported by two managing directors. The applicant pointed out that members of the Bank's Board of Directors normally did not involve themselves in the Bank's lending activities. He considered the allegations as

defamatory in that they accused him of allowing interests other than those of the Bank determine his position regarding the Bank's business with individual companies and of unlawful conduct, in breach of general business rules and ethics and administrative practice.

By a judgment of 3 May 2000 the District Court found for the respondent and against the applicant. The latter appealed but by a judgment of 19 December 2000 the Supreme Court rejected his appeal.

The Supreme Court observed that the author of the disputed article had made no attempt to prove that the applicant had been involved in the decision in question. However, he had submitted that the employees of the Bank who had been responsible for assessing the IBC's credit rating had told him and his associates about the applicant's involvement. The documentary evidence provided no indication that the refusal of credit could not have been based on legitimate business reasons. The take over by the new majority shareholders had given rise to considerable struggle resulting in some uncertainty about the IBC's future but everything indicated that things had worked out well.

Turning to the impugned statements, the Supreme Court noted that allegation (2) did not specifically address the applicant. As to allegation (1), it observed that the remark did not refer to the Bank's decision-making process but only to informal explanations offered by its employees – no formal explanation had actually been provided for its withdrawal of the offer of credit. The respondent could only be required to prove what the representatives of the company had been told, by providing statements from the bank's employees. It would not be sufficient for him merely to provide statements by his associates; he would have to summon the relevant bank employees to give oral evidence before the court. The respondent had refused to do so in order to avoid embarrassing the employees concerned, which was understandable in view of the statutory confidentiality rules in section 43 of the Act on Commercial Banks and Saving Banks applicable to bank employees and the fact that they might be reluctant to give evidence about conduct regarded as embarrassing or even illicit by a member of the Bank's Board of Directors. Having regard in particular to the context in which the impugned remarks had been made, the applicant's interest in having them declared null and void could hardly be regarded as sufficient to require the Bank's employees to give evidence. In the view of the Supreme Court, the respondent could not be required to prove the truth of the disputed remarks as this would be unreasonably difficult for him to do. Considering the applicant' prominent position within the Independence Party and that he served on the Bank's Board of Directors and as Chairperson of the Broadcasting Licensing Committee, nominated by the Independence Party and elected by Parliament, as well as the requirement that his work in these areas be independent from his role as Secretary General of the Party, he ought to accept public discussion on these

connections. Cautiousness should be observed in any attempts to limit such discussion.

In a dissenting opinion Supreme Court Justice Mr Gardar Gislason stated *inter alia* that it could hardly have been difficult for the respondent author to summon the bank employees to give evidence. Not only had the plaintiff asked him to do so but it could also not be maintained that the bankers would thereby act in breach of confidence contrary to section 43 of the Act on Commercial Banks and Saving Banks. It had not been shown that requiring proof from the respondent would amount to an unreasonable burden being placed on him.

COMPLAINTS

The applicant complained that the national courts had violated his right to protection of honour and reputation under Article 8 of the Convention and had given him the burden of proof in breach of Article 6. He also relied on Article 14, in conjunction with both Article 6 and Article 8.

THE LAW

A. Complaint under Article 8 of the Convention

Article 8 of the Convention reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The applicant alleged that, in breach of the above provision, the national courts had failed to provide an adequate protection of his honour and reputation. Although he was not holding office as an elected politician, he could accept that, as a Secretary General of an important political party and as Chairperson of the Board of Directors of *Landsbanki* Islands, he in a similar way was a "public figure". Nonetheless, he should be able to enjoy protection against accusations of conduct which, if true, would have been illegal and morally repugnant. The impugned allegations were unsubstantiated factual allegations, not value judgments, and exceeded even the very wide limits of free speech protection afforded by Article 10.

The Court observes from the outset that it was not argued that the contested news coverage had affected the applicant's "private life" as such, only his professional reputation and situation. However, this provision, unlike Article 17 of the 1966 International Covenant on Civil and Political Rights of the United Nations, does not expressly guarantee a right to protection of honour and reputation. It is true that, as the Court has stated on previous occasions, the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological or moral integrity of a person (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 22; *Raninen v. Finland*, judgment of 16 December 1997, *Reports of judgments and Decisions* 1997-VIII, § 63) and can sometimes embrace aspects of an individual's physical and social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I; for a more detailed summary of the case-law, see *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III, § 61). Meanwhile, to date, in no case brought under Article 8 of the Convention has the Court ruled that this provision embodies a right to protection of reputation and honour as such, albeit that these are interests that may be taken into account in the determination of a complaint about a State's failure to ensure "the right to respect for ... private ... life" (see, for example, *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 49, ECHR 2004-...; *Mustafa Gürsel Aslan v. Malta*, (dec.) no. 29493/95, 3 February 2000; and *Michael Marlow v. the United Kingdom*, (dec.) no. 42015/98, 5 December 2000; *Rotaru v. Romania* [G.C.], no. 28341/95, § 44, ECHR 2000-V; *Fayed v. the United Kingdom*, (dec.) no. 17101/01, and judgment of 21 September 1994, Series A no. 294-B, pp. 50-51, § 67). Meanwhile, in the *Chauvy and Others v. France* (no. 64915/01, § 70, ECHR 2004-...), which concerned complaints brought under Article 10 of the Convention, the Court affirmed that "in the exercise of its European supervisory duties, [it] must verify whether the authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in this type of case, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right of the persons attacked by the book to protect their reputation, a right which is protected by Article 8 of the Convention as part of the right to respect for private life" (see also *Abeberry v. France* (dec.) no. 58729/00, 21 September 2004). However, even assuming that the matter in this case fell within the scope of Article 8, the Court considers that the Icelandic Supreme Court could reasonably arrive at the conclusion which it did that the interests in protecting freedom of speech were preponderant.

In this connection it should be emphasised that it was an undisputed fact that the Bank had refused to have any financial dealings with the IBC and had omitted to state any formal reasons. Moreover, it was clear that it did not normally fall within the applicant's role as member of the Bank's Board of Directors to take part in the Bank's processing of an individual loan

application. While the applicant categorically denied any involvement in the decision and could adduce witness evidence in support thereof, the author of the article relied on anonymous sources, who were employees of the Bank, stating that the applicant had been opposed to it doing any business with a company in which a third party, Mr J.O., took part. The Supreme Court considered that the respondent author of the article only be called to prove that this was indeed what the Bank's employees had told him. However, in the circumstances, the applicant's interests were not found to warrant placing that burden on the respondent author. The latter had refused to embarrass his sources by asking them to give evidence and they were probably reluctant anyway to give evidence about conduct regarded as inappropriate or unlawful by a member of the Bank's Board of Directors.

It should be observed that the impugned statements in question indisputably concerned a matter of genuine public interest, namely the motives of *Landsbanki*, a major bank in Iceland, for refusing to have any business dealings with a particular national media company, the IBC. The article was published in the context of a public debate in which the Icelandic Prime Minister and other Independence Party leaders had criticised the acquisition of shares by a foreign group in the Icelandic Investment Bank. The purpose was to counter that criticism by highlighting an opinion about the conduct of affairs in the past by leaders of that party.

The Court further notes that the subject matter of the disputed speech was of a political nature. It must be recalled that, according to the Strasbourg Court's case-law, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, pp. 25 and 26, §§ 38 and 42; *Wingrove v. the United Kingdom* judgment of 25 November 1996, *Reports* 1996-V, p. 1957, § 58; *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV; *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, p. 22, § 45; *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 46, ECHR 1999-VIII). Moreover, the critical allegations addressed the applicant as a "public figure" and a person involved in politics on account of his dual roles as Chairperson of the Bank's Board of Directors and as Secretary General of the Independence Party (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 50, ECHR, 1999-I, and *Lingens* cited above, § 42). Having laid himself open to close scrutiny of his every word and deed by both journalists and the public at large, he could reasonably be expected to display a greater degree of tolerance towards criticism with regard to his performance of these roles than a private individual.

Against this background, the Court does not find that the applicant's complaint that the standards of evidence applied by the Supreme Court, regarding the extent to which the author of the article should be required to prove the veracity of his allegations as to the motives for the Bank's refusal,

was capable of raising an arguable issue of failure to comply with the applicant's right to respect for private life under Article 8 of the Convention. It follows that this part of the application must be rejected as being manifestly ill-founded under Article 35 §§ 3 and 4 of the Convention.

B. Complaint under Article 6 of the Convention

The applicant further complained that, by not requiring the respondent to prove the veracity of his allegations, the national courts had effectively reversed the burden of proof and thereby denied him equality of arms in breach of Article 6 of the Convention.

However, the Court reiterates that the taking of evidence is governed primarily by domestic law and that it is primarily for the national courts to assess the evidence before them. The task of the Court is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see, for instance, *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, § 34; *S.N. v. Sweden*, no. 34209/96, § 44, ECHR 2002-V). In the view of the Court the proceedings before the domestic courts in the instant case disclose no appearance of failure to observe the requirements of fairness under Article 6 of the Convention. It follows that also this part of the application must be rejected as being manifestly ill-founded under Article 35 §§ 3 and 4 of the Convention.

C. Complaints under Article 14 of the Convention, taken together with Articles 6 and 8

The applicant, referring essentially to the same facts as those complained of under Articles 6 and 8 of the Convention, in addition complained that he had been the victim of discrimination on account of his social status, in breach of Article 14 of the Convention.

However, the Court, for the reasons stated above and in so far as the matter falls within its jurisdiction, finds that this complaint discloses no appearance of discrimination contrary to Article 14. It follows that this part too of the application must be rejected as being manifestly ill-founded under Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President