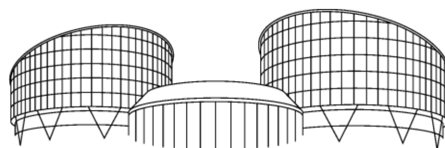

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF UNGVÁRY AND IRODALOM KFT. v. HUNGARY

(Application no. 64520/10)

JUDGMENT

STRASBOURG

3 December 2013

FINAL

03/03/2014

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Ungváry and Irodalom Kft v. Hungary,

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

Guido Raimondi, *President,*
Işıl Karakaş,
Peer Lorenzen,
András Sajó,
Nebojša Vučinić,
Helen Keller,
Egidijus Kūris, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 5 November 2013,

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

PROCEDURE

1. The case originated in an application (no. 64520/10) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr Krisztián Ungváry and a limited liability company, Irodalom Kulturális Szolgáltató Kft ("Irodalom Kft"), on 31 October 2010.

2. The applicants were represented by Ms A. Csapó, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Public Administration and Justice.

3. The applicants alleged, in particular, that the civil proceedings for defamation brought against them and the order to pay compensation for non-pecuniary damage had breached their right to freedom of expression.

4. On 20 February 2012 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1969 and lives in Budapest. The second applicant, Irodalom Kft, is a Hungarian limited liability company, with its seat in Budapest.

6. Mr Ungváry is a well-reputed historian specialised in 20th century Hungarian history including State security under the Communist regime.

Irodalom Kft is the publisher of the literary and political weekly *Élet és Irodalom*.

7. On 18 May 2007 *Élet és Irodalom* published a study (entitled *The Genesis of a Procedure – Dialógus in Pécs*) written by Mr Ungváry. The article dealt with the actions of the security service against a spontaneous student peace movement ("*Dialógus*") active in Pécs and elsewhere in the country in the 1980s. The author stated *inter alia* that:

> "... the *Dialógus*-affair had demonstrated ... how closely the Ministry of the Interior and the 'social organisations' – which had taken over some State-security functions covertly, in case of necessity – had been intertwined".

8. The lead of the article pointed out that the recent scandals exposing former agents acting for the party-State's security system covered up the fact that most reporting for that system had been done through accidental, social or official contacts (as had been the case with a Mr K., a judge of the Constitutional Court at the material time, elected by Parliament), rather than by actual agents.

The lead contained the following passage:

> "From the perspective of informing (*besúgás*) and repression (*megtorlás*), Officer J. W. ... and the nine "official contacts" (*hivatalos kapcsolat*) proved to be a lot more important ... [in the *Dialógus*-affair], [these official contacts including] Mr K. (today judge of the Constitutional Court)... Their respective responsibilities are of course different."

The author argued that Mr K., without being an actual agent,

> "... was in regular and apparently collegial (*kollégiális*) contact with the State security, quite often anticipating and exceeding its expectations" ... "and as an official contact, he was busy as an informant (*besúgó*) and demanding hard-line policies".

The writing made reference to the role of further contemporary public figures, amongst others the Prime Minister, a member of the European Economic and Social Committee, a former Member of Parliament and a university professor.

9. In the article, Mr Ungváry relied, *inter alia*, on documents available in the Historical Archives of the State Security Service archived as a "strictly confidential action plan". Referring to the above material, he described the role played by leaders of Pécs University – including Mr K., deputy secretary of the local party committee between 1983 and 1988 – in assisting the security operations.

Mr Ungváry characterised Mr K.'s attitude in the *Dialógus* case as that of a "hardliner", in comparison to other "social contacts". He recalled that Mr K. had ordered the removal of *Dialógus*'s poster, saying that "the country did not need such an ... organisation [i.e. *Dialógus*]", and that he

had reproached a candidate in the Communist youth organisation's elections for having been supported by *Dialógus*.

10. In its next issue of 25 May 2007 *Élet és Irodalom* published Mr K.'s statement written in response to the disputed article, denying the allegations.

11. On 27 May 2007 a television channel broadcast an interview with Mr Ungváry about the article published in *Élet és Irodalom*. He reiterated his argument that in the previous political system most reporting had been done through accidental, social or official contacts. He argued that providing information, writing reports or removing posters would have qualified as agent activities, and Mr K. had been responsible for at least one of them. He called the latter 'trash'.

Mr K. initiated proceedings with a view to obtaining a rectification in the press, refuting the applicants' allegations. His claim was sustained by the courts and the second applicant published a rectification on 22 February 2008.

12. In April 2008 a reference book co-authored by Mr Ungváry was published outlining the history of the Communist State security and including a chapter with the full version of the article published in *Élet és Irodalom*.

13. On 30 April 2008 an interview with Mr Ungváry appeared on an internet news portal concerning the release of the book, where he called Mr K. "a party secretary writing mood reports".

14. Mr K. filed a criminal complaint against Mr Ungváry on charges of libel. In the course of the ensuing proceedings the latter apologised for having called him 'trash' in the television interview.

The second-instance criminal court was of the view that the statements in question constituted opinions. Mr Ungváry was acquitted on 25 February 2010.

15. Meanwhile, Mr K. filed a defamation action against both applicants.

On 9 February 2009 the Budapest Regional Court found that Mr Ungváry had infringed Mr K.'s personality rights through his statements made in the study published in *Élet és Irodalom*, the television interview and the book. The second applicant was found to have violated Mr K.'s personality rights through publishing the study. The court relied on section 84(1) of the Civil Code.

16. Relying in essence on the findings of fact established in the rectification proceedings (see paragraph 11 above), the court established that Mr Ungváry and the publisher had disseminated false and unproven statements tarnishing the reputation of Mr K. by maintaining that the latter had acted as a quasi-agent during the Communist regime, been an informant of and collaborated with the State security, reported to them and carried out their orders, and been a "hardliner" in 1983.

The court further found that Mr Ungváry had falsely interpreted Mr K.'s political criticism towards a candidate in the Communist youth organisation's elections as an action motivated by the State security.

17. The court ordered Irodalom Kft to pay 1,000,000 Hungarian forints (HUF) (approximately 3,500 euros (EUR)) in respect of the article published in *Élet és Irodalom*. Mr Ungváry was ordered to pay HUF 2,000,000 (EUR 7,000) in damages.

18. On appeal, on 13 October 2009 the Budapest Court of Appeal reversed this judgment and dismissed Mr K.'s action, holding that the impugned statements were value-judgments with sufficient factual background. However, it found that Mr Ungváry had violated Mr K.'s right to honour by calling him 'trash'. This part of the judgment became final.

19. On Mr K.'s petition for review, on 2 June 2010 the Supreme Court reversed the second-instance decision as to the remainder of the case. It found for Mr K., ruling that his personality rights had been violated by the false impression, given by the article in question, that he had been a quasi-agent and an informant during Communist times, collaborated as an 'official contact' with the State security and written reports for them, countered the youth organisation official's election on the secret service's instigation and demanded hard-line policies in 1983.

The court held that the article had not presented fact-driven conclusions of a historical research but mere defamatory and unsubstantiated statements about Mr K. It further affirmed that the applicants had been required to prove the truth of these allegations but had provided no such factual background.

The Supreme Court observed that there was no evidence that Mr K.'s report within the party hierarchy on the *Dialógus*-affair had been written on the commission, instruction or expectation of the Ministry of the Interior.

The judgment contained in particular the following passages:

> "The concept of the author of the impugned article is in essence that, during [the Communist] regime, the so-called 'official contacts' also played an important role in the State security's activities, in addition to the [actual] agents. It is probably true that the Ministry of the Interior indeed considered certain [officials] as 'official contacts'. It can also be assumed that some of them occasionally cooperated with the State security as 'official contacts', that is, carried out State-security tasks, surveyed, reported – in other words, were active in the manner described by the author as 'unambiguously incarnating the activities of an agent'. However, it is not possible to deduce from this potentiality the general conclusion that every single [official] acted as an 'official contact'; consequently, in the absence of proven facts, it is not acceptable to qualify all potentially available personalities [i.e. Communist party secretaries] as 'official contacts' actually cooperating with the State security. Public opinion condemns those persons who cooperated with the State security, even if they do not fall within the actual category of 'agent' or 'informant'. Therefore, if someone is characterised, without a proper ground, as actually having carried out such activities, this violates that person's reputation, according to public opinion. ...

However, [Mr Ungváry] has committed breaches of law also in addition [to the authoring of the article], which themselves have justified – although all the breaches have originated in the article published in *Élet és Irodalom* – the plaintiff's claim for non-pecuniary damage. In respect of the statements made in [the television broadcast] and the book, the Supreme Court establishes the further, reasonable non-pecuniary damage due to the plaintiff in the amount of 1,000,000 Hungarian forints."

20. The Supreme Court ordered the applicants, jointly and severally, to pay damages in the amount of 2,000,000 Hungarian forints (HUF) (approximately 7,000 euros (EUR)) and accrued interest, whereas Mr Ungváry had to pay another HUF 1,000,000 (EUR 3,500) and accrued interest (see paragraph 19 above). The legal costs to be borne by the applicants amounted to approximately EUR 3,300, not including the applicants' own legal expenses. The plaintiff's claim as to an obligation on the side of the respondents to publish a compensatory statement was rejected as having been inadequately formulated.

II. RELEVANT DOMESTIC LAW

21. Act no. XX of 1949 on the Constitution (as amended and as in force at the material time) provides as follows:

Article 59

"(1) In the Republic of Hungary everyone shall have the right to good reputation, the inviolability of his home, and the protection of privacy and personal data."

Article 61

"(1) In the Republic of Hungary everyone shall have the right to freedom of expression and to receive and impart information of public interest."

22. Act no. IV of 1959 on the Civil Code provides, in so far as relevant, as follows:

Section 75

"(1) Personality rights shall be respected by everyone. Personality rights are protected by law."

Section 78

"(1) The protection of personality rights shall also include the protection of good reputation.

(2) In particular, the statement or dissemination of an injurious and untrue fact concerning another person, or the presentation with untrue implications of a true fact relating to another person, shall constitute defamation."

Section 84

> "(1) A person whose personality rights have been infringed may bring the following civil law claims, depending on the circumstances of the case:
>
> a) a claim that the court establish that an infringement has taken place;
>
> b) a claim that the infringement be discontinued and the perpetrator be prohibited from further infringement;
>
> c) a claim that the perpetrator be ordered to give satisfaction by making a declaration or in any other appropriate manner and, if necessary, this be made adequately public by or at the expense of the perpetrator;
>
> d) a claim that the prejudicial situation be terminated, and that the situation prior to the infringement be restored by or at the expense of the perpetrator;
>
> e) a claim for damages under the rules of civil law liability."

23. The Preamble of Act no. II of 1986 on the Press provides as follows:

> "The Constitution of the Republic of Hungary guarantees the freedom of the press. Everyone shall have the right to express his views or publish his works in the press if they do not violate the constitutional order of the Republic of Hungary."

24. Act no. III of 2003 on the Disclosure of the Secret-Service Activities of the Former Regime and the Establishment of the Historical Archives of the State Security Service provides as follows:

Section 4

> "(1) The Archives authorises a scientific research if the researcher has fulfilled the conditions laid down in [the Act], submits his detailed research plan and his list of publications, if any. The researcher may have access to the documents stored in the Archives within the limits prescribed in subsections (2) and (3); and use them according to the rules concerning the handling of information for the purposes of scientific research, contained in the [relevant law]."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. The applicants complained that, by concluding that they had committed defamation and imposing non-pecuniary damages on them, the Supreme Court had infringed their right to freedom of expression as provided 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.”

26. The Government contested that argument.

A. Admissibility

27. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Whether there has been an interference

28. The Court notes that it has not been disputed by the Government that there was an interference with the applicants’ right to freedom of expression.

The Court reiterates that an interference with the applicants’ rights under Article 10 § 1 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 those aims.

2. “Prescribed by law”

29. The Court observes that the measure complained of was based on sections 75, 78 and 84 of the Civil Code, the accessibility and foreseeability of which have not been contested. It is therefore satisfied that it was “prescribed by law”. Moreover, this has not been disputed by the parties.

3. *Legitimate aim*

30. The Court considers that it is generally for the national courts to determine the facts bearing on the litigation, and finds no reason to depart from the Hungarian courts' conclusion that the impugned statement was capable of affecting the plaintiff's reputation. Consequently, it is satisfied that the interference pursued a legitimate aim, namely the protection of the reputation or rights of others.

4. *Necessary in a democratic society*

a. The parties' submissions

i. The Government

31. The Government argued that a distinction needed to be made between statements of facts and value judgments. They relied on the Contracting States' margin of appreciation to establish whether a statement amounted to a statement of fact or a value-judgment which was not susceptible to proof. They endorsed the domestic courts' argument that the impugned expressions in the present case were not "qualifying adjectives in connection with the plaintiff's person" but "untrue statements of facts" injurious to the plaintiff's reputation.

32. The Government drew attention to the domestic courts' findings that the manifestly defamatory statements made in relation to Mr K.'s activities had overstepped the bounds of journalistic freedom enjoyed vis-à-vis public persons.

33. They also submitted that the applicants had been sanctioned under the provisions of the Civil Code and forbidden from further infringements, obliged to publish the operative part of the judgment in the media and to pay compensation. Thus, in the Government's view, the sanctions imposed had not been disproportionate, especially as they were of a civil rather than a criminal character.

ii. The applicants

34. The applicants submitted that the interference with their right to freedom of expression as a result of the sanctions imposed on them by the domestic courts was not necessary in a democratic society.

They maintained, firstly, that by publishing the impugned article in a weekly journal, they had intended to draw attention to the public issues relating to the role of key players in the previous regime, in the present case a former deputy secretary of the local party committee, then a Constitutional Court judge.

35. The applicants also emphasised their role as a historian and publicist and as a publishing company in a pluralistic society; they considered that, as

such, they had a duty to disseminate information on matters relating to the understanding of the country's past.

They asserted that the impugned statements were directed against Mr K., who as a Constitutional Court judge should have accepted that he attracted public scrutiny in connection with his activities during the Communist rule.

36. The applicants stated, further, that the statements in the article were value-judgments based on facts. They contested the domestic courts' reasoning that the statements had disseminated untrue facts about Mr K.

Lastly, they argued that the sanctions imposed on them had been excessive and susceptible to obstructing the discussion on the collaboration of public officials with the previous regime.

b. The Court's assessment

i. General principles

37. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to 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, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V; and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII).

38. The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole, including the content of the comments held against the applicants and the context in which they made them (see *News Verlags GmbH & Co. KG v. Austria*, no. 31457/96, § 52, ECHR 2000-I).

39. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient" and whether the measure taken was "proportionate to the legitimate aims pursued" (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the

principles embodied in Article 10 (see, among many other authorities, *Zana v. Turkey*, 25 November 1997, § 51, *Reports of Judgments and Decisions* 1997-VII).

40. As to the sufficiency of those reasons for the purposes of Article 10 of the Convention, the Court must take account of the overall background against which the statements in question were made. Thus, the contents of the impugned articles cannot be looked at in isolation from the controversy (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III).

41. Furthermore, as the Court has previously pointed out in cases such as the present one concerning the press, a factor of particular importance for its determination is the vital role of "public watchdog" which the press performs in a democratic society (see *Fatullayev v. Azerbaijan*, no. 40984/07, § 88, 22 April 2010); and the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press imparting information of serious public concern (see *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports* 1996-II). The Court reiterates that the press plays a pre-eminent role in a State governed by the rule of law. Although it must not overstep certain bounds set, *inter alia*, for the protection of the reputation of others, it is nevertheless incumbent on it to impart – in a way consistent with its duties and responsibilities – information and ideas on political questions and on other matters of public interest (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 34, Series A no. 313). Not only does the press have the task of imparting such information and ideas; the public also has the right to receive them (see *Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103).

42. Nevertheless, Article 10 does not guarantee wholly unrestricted freedom of expression to the press, even with respect to coverage of matters of serious public concern. While enjoying the protection afforded by the Convention, journalists must, when exercising their duties, abide by the principles of responsible journalism, namely to act in good faith, provide accurate and reliable information, objectively reflect the opinions of those involved in a public debate, and refrain from pure sensationalism (see, among many others, *Fressoz and Roire* [GC], cited above, §§ 45, 52; Bladet Tromsø *and Stensaas*, cited above, § 65, ECHR 1999-III; *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 78, ECHR 2004-XI; and *Stoll v. Switzerland* [GC], no. 69698/01, §§ 102-103, 149, ECHR 2007-V).

43. In the exercise of its supervisory duties, the Court must verify in particular whether the authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in cases such as the present application, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right of the person concerned to protect his reputation, a right which is enshrined in

Article 8 of the Convention as part of the right to respect for private life (see *Chauvy and Others,* cited above, § 70) – while being mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick*, cited above, § 38). However, offence may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult (see, e.g. *Uj v. Hungary*, no. 23954/10, § 20, 19 July 2011; *Skałka v. Poland*, no. 43425/98, § 34, 27 May 2003).

44. Furthermore, the limits of acceptable criticism may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. However, the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence; and it may therefore prove necessary to protect judges from offensive and abusive verbal attacks (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports* 1997–I; *Janowski v. Poland [GC]*, no. 25716/94, § 33, ECHR 1999-I).

45. Where the right to freedom of expression is being balanced against the right to respect for private life, the relevant criteria have been laid down in the Court's case-law as follows (see *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 90 to 109, 7 February 2012): (a) contribution to a debate of general interest; (b) how well known the person concerned is and what the subject of the publication was; (c) prior conduct of the person concerned; (d) method of obtaining the information and its veracity; (e) content, form and consequences of the publication; and (f) severity of the sanction imposed.

46. Moreover, in order to assess the justification of an impugned statement, a distinction needs to be made between statements of fact and value judgments in that, while the existence of facts can be demonstrated, the truth of value judgments is not susceptible to 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, for example, *Lingens v. Austria*, 8 July 1986, § 46, Series A no. 103; *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 63, Series A no. 204). The classification of a statement as a fact or as a value-judgment is a matter which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts (see *Prager and Oberschlick*, cited above, § 36). However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive (see *Jerusalem v. Austria,* no. 26958/95, § 43, ECHR 2001-II). As the Court has noted in previous cases, the difference lies in the degree of factual proof which has to be established (see *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 40, ECHR 2003-XI).

47. There is a distinction to be drawn between reporting facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual's private life (see *Armonienė v. Lithuania*, no. 36919/02, § 39, 25 November 2008). In respect of the former, the pre-eminent role of the press in a democracy and its duty to act as a "public watchdog" are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life (see e.g. *Hachette Filipacchi Associés (*ICI PARIS*) v. France*, no. 12268/03, § 40, 23 July 2009; and *MGN Limited v. the United Kingdom*, no. 39401/04, § 143, 18 January 2011). Such reporting does not attract the robust protection of Article 10 afforded to the press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation (see *Société Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 1 July 2003; *Leempoel & S.A. ED. Ciné Revue v. Belgium*, no. 64772/01, § 77, 9 November 2006; *Hachette Filipacchi Associés* (*ICI PARIS)*, loc. cit.; and *MGN Limited*, loc. cit.). While confirming the Article 10 right of members of the public to have access to a wide range of publications covering a variety of fields, the Court stresses that in assessing in the context of a particular publication whether there is a public interest which justifies an interference with the right to respect for private life, the focus must be on whether the publication is in the interest of the public and not whether the public might be interested in reading it (see *Mosley v. the United Kingdom*, no. 48009/08, § 114, 10 May 2011).

48. The most careful scrutiny on the part of the Court is called for when the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern (see *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298). In this regard, the amount of compensation awarded must "bear a reasonable relationship of proportionality to the ... [moral] ... injury ... suffered" by the plaintiff in question (see *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 49 Series A no. 316-B; and *Steel and Morris v. the United Kingdom*, no. 68416/01, § 96, ECHR 2005-II, where the Court held that the damages "awarded ... although relatively moderate by contemporary standards ... [were] ... very substantial when compared to the modest incomes and resources of the ... applicants ..." and, as such, in breach of the Convention; see also *Lepojić v. Serbia*, no. 13909/05, § 77 *in fine*, 6 November 2007, where the reasoning of the domestic courts was found to be insufficient given, *inter alia*, the amount of compensation and costs awarded equivalent to approximately eight average monthly salaries).

ii. Application of those principles to the present case

49. The Court notes that the study contained mostly a factual description of the events from the foundation of the *Dialógus* movement until its dissolution in late 1983. It also included a detailed account of specific actions of certain individuals. As regards Mr K., the article stated that he had ordered the removal of the movement's poster from the university's bulletin board, had prepared reports as a party member, and had reproached a candidate in the Communist youth organisation's elections for having been supported by *Dialógus*. As it appears from the circumstances of the case, these activities were not in dispute in the domestic proceedings.

50. The courts criticised the applicants for having advanced remarks that in the "*Dialógus*-case" Mr K. had acted as "an official contact" of the secret services, collaborated with them as a quasi-agent, even exceeding what had been expected from such "official contacts", and had been a hardliner in comparison with other officials. The domestic courts found that these statements were allegations of fact susceptible to proof. The applicants never endeavoured to provide any justification for these allegations, and their truthfulness has never been proved. The applicants argued throughout the proceedings that the disseminated statements did not constitute statements of facts, but were value judgments and conclusions of a historian with sufficient factual background.

(α) Assessment of the case in respect of the first applicant

51. At the outset the Court observes that the impugned statements were made in regard to a public official. Although the article asserted that Mr K. cooperated as an "official contact" with the State security of the previous regime, this criticism was limited to his role as a party official in the 1980s while in office at Pécs University and did not focus on his contemporary professional conduct as a Constitutional Court judge. In the Court's view, in this particular context Mr K. as a public figure had to tolerate stronger criticism by the first applicant acting in his capacity as historian. Mr K. was not prevented from responding to the allegations because of professional self-restraint (*retenue*) due to his function and indeed made use of the press to make his views known.

52. Concerning the question as to whether the statements were factual, the Court does not dispute (see *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 76, ECHR 2004-XI) the domestic qualification of the allegations, namely that they were factual in nature, although it notes that the second-instance criminal court and the civil Court of Appeal considered them opinions (see paragraphs 14 and 18 above). The Court further recalls that an assumption as to the reasons and possible intentions of others is a value judgment, not a statement of facts that would lend itself to proof (cf. *a/s Diena and Ozoliņš v. Latvia*, no. 16657/03, § 81, 12 July 2007).

In certain cases, the Court has objected to the restrictive definition of a term (e.g. the term “neo-fascist”, see *Karman v. Russia*, no. 29372/02, § 40, 14 December 2006) resulting in a selective interpretation which may warrant different facts to be proven. The Court finds that the term “official contact” is a wide one, capable of evoking in those who read it different notions as to its content and significance (see *Feldek v. Slovakia*, no. 29032/95, § 86, ECHR 2001-VIII).

53. The Court notes the finding of the Supreme Court according to which the first applicant was unable to prove that Mr K. had been in regular contact with the State security, often anticipating and exceeding its expectations. The Court finds that these expressions exceeded the limits of journalism, scholarship and public debate. In the present case, it is not the – arguably excessive – form of the expression but the defamatory content of these speculations, which the Court finds objectionable as being without sufficient factual support.

Moreover, the Supreme Court noted that the allegations had subsequently been reproduced in a television broadcast and a book (see paragraph 19 above), causing additional injury to Mr K. The Court likewise finds objectionable that the statements were repeated even after the judgment of rectification, by the publication of the book in question (see paragraph 12 above).

54. The Supreme Court attributed much weight to the statement, which described Mr K. as an “official contact” who had actually cooperated with the State security; and it found that that statement was devoid of a factual basis.

The requisite most careful scrutiny (see paragraph 48 above) requires the Court to consider whether the statements were interpreted in light of the article as a whole. For the Supreme Court, it was essential for the finding of lack of factual grounds (and of the resultant false perspective in which the applicants were found to have portrayed Mr K.) that there was no evidence that Mr K.’s report on the *Dialógus* affair made within the party hierarchy had been written on the commission, instruction or expectation of the Ministry of the Interior (see paragraph 19 above).

55. However, the Court notes that the article intended to demonstrate that collaboration, that is, the activities of “official contacts” meant cooperation without specific, express operational instructions from the State security. Limiting its analysis to this kind of direct cooperation with the State security, the Supreme Court failed to consider that Mr K.’s reports had been in any case available to the authorities of the Communist regime, nor did it attribute any particular relevance to the fact that the first applicant’s undeniably offensive and exaggerated statements were made within the context of the broader presentation of the workings of the oppressive mechanism of a totalitarian regime. It did not consider relevant, either, that the first applicant had indicated the sense in which he had used the term

informing (see paragraph 8 above). Indeed, the article was written in order to demonstrate how closely the Ministry of the Interior and the "social organisations" had worked together, and especially, how tight the relation had been between party functionaries and the Ministry of the Interior (see paragraph 7 above).

56. The Court further recalls that the degree of precision for establishing the well-foundedness of a criminal charge by a competent court can hardly be compared to that which ought to be observed by a journalist or a historian when expressing his opinion on a matter of public concern, for the standards applied when assessing someone's past conduct in terms of morality are quite different from those required for establishing an offence under criminal law (see *e.g. Unabhängige Initiative Informationsvielfalt v. Austria*, no. 28525/95, § 46, ECHR 2002-I; *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*, no. 58547/00, § 39, 27 October 2005; and *Karman*, cited above, § 42).

57. It follows that the Supreme Court did not assess the impact on Mr K.'s personality rights in the light of the role of the press and did not apply the "most careful scrutiny", which is to be exercised by the Court in the present context. In particular, it did not consider the fact that many of the allegations regarding the involvement of Mr K. in the actions directed against the *Dialógus* movement had been proved true (cf. Bladet Tromsø *and Stensaas*, cited above, § 71).

58. In the context of the public debate regarding historical responsibility for the injustices of Communism, the Supreme Court argued that it was not acceptable to qualify all potentially available officials, that is, Communist party secretaries, as "official contacts" actually cooperating with the State security.

The Court notes that the Supreme Court interpreted the first applicant's description of these officials as one portraying them "guilty by association" – which, in that court's view, could not prove that Mr K. "actually cooperated" with the State security (see paragraph 19 above).

The Court cannot agree with the deduction of the Supreme Court. This line of reasoning disregards the fundamental tenet of the article, namely that the "official contacts" writing reports had indeed contributed to the work of the State security, and that even the "official contacts" had had a certain degree of freedom in cooperation. In the Court's eyes, the evaluation of the use of this freedom in cooperation is a fact-related value judgment.

59. The Supreme Court concluded that the impugned defamatory statement, in the absence of a factual ground, presented Mr K. in a false light or was false.

The Court finds that although the first applicant did not prove that Mr K. and his reports had actually been commissioned by the State security, it was nevertheless an undisputed fact that he, as a party secretary, had produced reports on the *Dialógus* affair.

The Court finds that, on careful scrutiny, the broader connotation of "cooperation" should have also been considered; and in regard to that broader connotation, the restrictive interpretation of the impugned terms of the article by the Supreme Court pre-empted the consideration of other facts which were relevant to these terms and also the possibility to consider them as opinion (see paragraphs 53 and 58 above) with sufficient factual basis.

60. In view of the principal thesis of the article (see paragraphs 7 and 19 above) it is plausible that the expressions "reporting", acting as "informant", or "collegial contact" do not refer to those activities being actually commissioned by the State security. The Supreme Court understood these activities as belonging to his responsibilities within the Party, without considering the relation thereof to the goals of the State security.

The Court finds such a selective interpretation of the impugned statements, with the resultant burden of proof incumbent on the first applicant, hardly compatible with the demands of the most careful scrutiny applicable in the present case.

61. Beyond the demand of the most careful scrutiny that is required in the distinction of facts and opinion and in the evaluation of the factual basis of defamatory opinions, the assessment of the proper balancing between personality rights and freedom of speech rights requires the consideration of certain particular elements, outlined in paragraph 42 above.

62. As to the criterion of contribution to a debate of general interest, the Court notes that the statements held against the first applicant concerned the recent history of Hungary and aimed at shedding new light on the functioning of the secret service and, in particular, its reliance on public and party officials. The publication was based on research done by Mr Ungváry, a known historian, who, as specified in the introduction to the article, relied on material available in the Historical Archives of the State Security.

63. Against this background, the Court observes that various issues related to the Communist regime still appear to be open to on-going debate between researchers, in the general public as well as in Parliament (see paragraphs 19 and 24 above), and as such should be a matter of general interest in contemporary Hungarian society. It considers that it is an integral part of freedom of expression to seek historical truth and it is not its role to arbitrate on the underlying historical issues, which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation (see *Chauvy and Others*, cited above, § 69). It therefore concludes that this publication deserves the high level of protection guaranteed to political discourse – and the press, in view of its functions. However, these considerations are absent in the Supreme Court judgment (see also paragraph 60 above).

64. Concerning the question as to how well known the person concerned is and what the subject of the publication was, the Court considers that the personal moral integrity of holders of high offices is a matter of public

scrutiny in a democratic society. The highest office holders, who are elected in the political process, must accept that their past public and political conduct remains open to constant public scrutiny. Mr K. was elected to one of the highest judicial positions by Parliament. The domestic courts established that he was a public figure in that he was member of the Constitutional Court at the time when the impugned statements were made. The publication did not concern his personal life but his public behaviour in the past, a matter that, in the Court's view, is to some extent related to his position in 2007-2008. In fact, Mr K. did not conceal his past position within the Communist party. The Court is satisfied that since he was active, in his official capacity, in the public domain, he should have had a higher degree of tolerance to criticism (see *Jerusalem*, § 39, cited above).

65. As regards the prior conduct of the person concerned, the Court notes that Mr K. was an elected deputy party secretary at a university in 1983. The Court cannot disregard the fact that the excessive criticism he had to face is related to his active participation in an organisation that was the recognised leading force in a totalitarian State, the People's Republic of Hungary.

66. Concerning the method of obtaining the information and its veracity, the Court observes that Mr Ungváry, a historian by profession, relied on archival research and could rely on certain uncontested facts in regard to the operation of the State security. In particular, it is uncontested that Mr K. had local responsibilities in the Communist party and that he took action against the *Dialógus* movement, for example by removing their poster.

67. As to the content, form and consequences of the publication, the impugned article was written for a weekly literary magazine. It presented a scholarly position, debated among historians, though using excessive language (see paragraph 54 above), but without any sensationalism. Mr K. had the opportunity to comment on the allegations in the next issue of the paper; moreover, a further rectification was presented in the magazine. He was not accused of criminal wrongdoing (compare and contrast, Bladet Tromsø *and Stensaas*, cited above, § 67), and there is no indication that he suffered any negative consequences in his professional activities.

68. Lastly, concerning the severity of the sanction imposed, it is true that the applicant was subjected to civil-law, rather than criminal, sanctions. However, he was ordered to pay a considerable amount of money in damages and legal costs (see *Koprivica v. Montenegro*, no. 41158/09, § 73, 22 November 2011). Moreover, the Court considers that the measure applied, in a matter which affects Mr Ungváry's professional credibility as a historian, is capable of producing a chilling effect. In this connection, the Court emphasises that a rectification of the statement of facts had already been ordered by a national court; and the subsequent sanctions were not strictly necessary to provide an adequate remedy to Mr K. – who otherwise

failed to claim in a proper form (see paragraph 20 above) a publication to give satisfaction at the expense of the perpetrator.

69. Having regard to the foregoing considerations, the Court finds that the domestic courts, by disregarding the above elements, did not establish convincingly a proper balance among the personality rights of a public figure and the first applicant's right to freedom of expression – a right that directly served the general interest by furthering the debate on an issue of great public interest. The reasons adduced by those courts cannot be regarded as sufficient and relevant justification for the interference with the first applicant's right to freedom of expression. The national authorities therefore failed to strike a fair balance between the relevant rights and related interests. The Court would add that the finding of lack of a fair balance is without any prejudice to the personality rights of Mr K., which were affected by the improper statements of the first applicant (see paragraph 54 above).

70. Accordingly, the interference complained of was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention in regard to the first applicant.

(β) Assessment of the case in respect of the second applicant

71. The Court notes that the findings in regard to the lack of proper balance among the rights at stake hold true in respect of the second applicant as well, notwithstanding the fact that the sanction applied in its regard was not a matter of concern *per se*.

72. At this juncture, the Court also notes that the second applicant published Mr K.'s position about Mr Ungváry's statements on 25 May 2007, in the subsequent number of *Élet és Irodalom*. Thus, it allowed readers to form their own opinion by placing the article in question alongside the declarations of Mr K.

73. The Court further notes that the second applicant published an article discussing matters which have been found to be of public interest. In this connection, the Court considers that the impugned article was to a certain extent based on allegations of fact and as such susceptible to proof. It must therefore be examined whether the paper could reasonably regard the article written by a known historian as reliable with respect to the allegations in question and whether there were any special grounds for the paper to dispense with verifying if the allegedly defamatory information had a basis in facts.

74. Publishers are understandably motivated by considerations of profitability and by holding them responsible for publications often results in proprietary interference in the editorial process. In order to enable the press to exercise its 'watchdog' function, it is important that the standards of liability of publishers for publication be such that they shall not encourage censorship of publications by the publisher. The consideration of liability-

related chilling effect is of relevance in the finding of the proper standard of care.

75. The Court observes that the access to the State security archives is restricted (see paragraph 24 above). It notes that the information serving as the factual basis for the allegations was thus, in all likelihood, not accessible for verification to the paper. At any rate, it would appear that the use of the archival sources requires special professional knowledge. The situation must be examined as it presented itself to the second applicant at the material time, rather than with the benefit of hindsight on the basis of the information obtained in the course of the domestic proceedings (see *Koprivica*, cited above, § 67; and Bladet Tromsø *and Stensaas*, cited above, § 66 *in fine*). The Court is satisfied that there was no reason for the second applicant to call into question the accuracy of an article written by a historian specialised in the affairs of the State security (see *Koprivica*, cited above, § 71).

Thus, the Court is satisfied that the second applicant acted in accordance with the rules governing journalistic ethics. Moreover, it does not appear that the second applicant acted in bad faith, with the intent to denigrate Mr K.

76. For the reasons above, the Court considers that there has been a violation of Article 10 of the Convention in respect of the second applicant as well.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. 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

78. The applicants claimed, respectively, 10,739 euros (EUR) and EUR 5,800 in respect of pecuniary damage. These amounts correspond to the indemnities they were obliged to pay, the court fees and the legal costs they owed to their adversary.

They moreover claimed EUR 6,000 and EUR 3,000 respectively in respect of non-pecuniary damage.

79. The Government contested these claims.

80. The Court considers that the applicants suffered pecuniary losses on account of the amounts they were ordered to pay to the plaintiff (see paragraph 20 above).

It awards the first applicant EUR 7,000 in respect of pecuniary damage, also having regard to his own conduct. It further awards the second applicant any sums which have been paid by it in execution of the domestic court judgment plus interest.

81. Moreover, in view of the conduct of the first applicant the Court concludes that the finding of a violation constitutes sufficient just satisfaction in his regard for any non-pecuniary damage sustained. It lastly considers that the second applicant must have suffered some non-pecuniary damage and awards it, on the basis of equity, EUR 3,000 under this head.

B. Costs and expenses

82. Each of the applicants claimed EUR 890 for the costs and expenses incurred before the domestic courts and EUR 1,800 for those incurred before the Court, the latter amount corresponding to the legal work billable by their lawyer.

83. The Government contested these claims.

84. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court dismisses the claims concerning the domestic proceedings, and awards the full sums claimed in respect of the proceedings before the Court, that is, EUR 1,800, to each of the applicants.

C. Default interest

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

FOR THESE REASONS, THE COURT

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

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

3. *Holds,* unanimously, that there has been a violation of Article 10 of the Convention in respect of the second applicant;

4. *Holds,* by four votes to three, that the finding of a violation constitutes sufficient just satisfaction in respect of the non-pecuniary damage which the first applicant suffered;

5. *Holds*, by four votes to three,

   (a) that the respondent State is to pay to the first 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, to be converted into Hungarian forints at the rate applicable at the date of settlement:

      (i) EUR 7,000 (seven thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage;

      (ii) EUR 1,800 (one thousand eight hundred euros) 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;

6. *Holds*, unanimously,

   (a) that the respondent State is to pay to the second 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) any sums which it has paid in execution of the domestic court judgment and the domestic statutory default interest on these sums, plus any tax that may be chargeable, in respect of pecuniary damage;

      (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, to be converted into Hungarian forints at the rate applicable at the date of settlement, in respect of non-pecuniary damage;

      (iii) EUR 1,800 (one thousand eight hundred euros), plus any tax that may be chargeable to the applicant, to be converted into Hungarian forints at the rate applicable at the date of settlement, 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;

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

Done in English, and notified in writing on 3 December 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Partly dissenting and partly concurring opinion of Judges Raimondi and Kūris;

(b) Partially dissenting opinion of Judge Lorenzen.

G.R.A.
S.H.N.

PARTLY DISSENTING AND PARTLY CONCURRING OPINION OF JUDGE KŪRIS, JOINED BY JUDGE RAIMONDI

I. CONCURRING VIEWS

1. I agree that in respect of Irodalom Kft, the publisher, there has been a violation of Article 10 of the Convention. This publisher applied "the proper standard of care" when it relied on the professional expertise of the author of the offending article, a historian; it also published Mr K.'s statement wherein the former denied the allegations against him. These considerations present a sufficient basis to find that this publisher "acted in accordance with the rules governing journalistic ethics" and should not be held liable for spreading statements of fact and/or value judgments unfavourable to the person whose past activities were judged in the article. This applies to the factual and legal situation examined in this particular case.

2. Still, with a view to possible future cases pertaining to freedom of expression in general, and to alleged defamation or libel in particular, a rider should perhaps have been added to make it clear that this finding (and the reasoning on which it is based) should not be interpreted as a general rule, that is to say as a judicial precedent dispensing publishers of liability in all, most, or even many cases concerning the aforesaid issues. The very fact that a publisher may have published something written by a professional and/or may, *a posteriori*, have allowed the publication of a rectification or a denial of an accusation, cannot, *per se*, absolve the publisher of liability for disseminating a text or other message in which a person has been groundlessly accused or defamed by an ill-disposed value-judgment. Such a rider would have been in line with the principles, set out in paragraph 43 of the judgment, that journalistic freedom "covers possible recourse to a degree of exaggeration, or even provocation", but that "offence may fall outside the protection of freedom of expression if it amounts to wanton denigration". This reminder was given in the "general principles" sub-section of the judgment but no reference was made of the second of these two principles in the part of judgment dealing with the assessment of the case in respect of the publisher. In my opinion, that part of the judgment should have explicitly emphasised that principle, as a message from the Court that publishers do have their own responsibility, both in the formal legal and in the wider social and moral sense, which cannot be transferred to the author alone. The Convention defends publisher's freedom to a very large extent, but not at the cost of absolute non-liability.

II. DISSENTING VIEWS

3. Regarding the finding that in respect of Mr Ungváry, the author of the impugned article, there has been a violation of Article 10 of the Convention, and the reasoning on which it is based, I respectfully disagree. The reasoning is sequential, thorough, addresses important aspects of the dispute

and refers to the relevant case-law of the Court as established to date. All this is most commendable.

4. However, the dispute regarding the alleged infringement of Mr Ungváry's freedom of expression is a borderline one where there is no clear-cut landmark precedent to serve as a point of reference, at least in one respect. The finding that the Hungarian authorities violated this applicant's freedom of expression can be compared with the opposite one: that his freedom was not violated. In principle, such a finding could be as plausible as that of the majority. The notion of "the Hungarian authorities" includes the Supreme Court of Hungary, which acted as the domestic court of last instance. As the juxtaposition of the majority's finding and the possible contrary finding favours no clear "winner" (as explained in paragraph 16 below), there is no pressing reason not to give the benefit of the doubt to the said court. Regrettably, the majority's standpoint was different.

5. Their finding is based on the reasoning that the Supreme Court did not strike a fair balance between the author's freedom of expression and the right of the person concerned to protect his reputation, both guaranteed by the Convention. Mr Ungváry published the article in which Mr K., a local Communist party official in the mid-1980s (deputy secretary in a university under the one-party rule), was reported to have ordered the removal of a poster of a students' movement, to have reported this to his party hierarchy and, at the secret service's instigation, to have reproached a candidate in a Communist youth organisation for having been supported by that movement. The author did not state outright that Mr K. was an "agent" of the Communist regime's State security, but he did invite, if not command of the reader the interpretation that Mr K. was not only "in regular and collegial contact with the State security" but also, presumably of his own free will and on his own initiative, "was in regular ... contact with the State security, quite often anticipating and exceeding its expectations". He called Mr K. "an official contact ... busy as an informant and demanding hard-line policies". According to the Supreme Court, such an assessment, if the author appeared unable to prove its veracity, amounted to qualifying Mr K. as a "quasi-agent" of the former undemocratic regime, and it found against Mr Ungváry.

6. Calling a person an "official contact" and a "quasi-agent" of the former Communist regime, however reproachful in the eyes of today's citizenry, is not a legal but a moral and a political statement and *per se* does not entail legal consequences. Both the notion of an agent and that of a quasi-agent of a secret service suggest that the person's actions contribute to the ends of that agency and, in the broader sense, of the corresponding regime. Such actions are typically covert, as others are not supposed to know about the agent's or quasi-agent's relationship with that agency. Both notions, at least for the purposes of this case, are limited to outsiders to the agency, that is to volunteer helpers, informants and other "outside" collaborators whose services are made use of by the agency, and exclude "normal" employees thereof. The relation between these notions, as they are perceived by the public at large, must also be considered. When one is called an agent of a secret service, it means that one is presumed to receive orders from that agency, to carry them out and (more often than not) to receive payment or other benefits for doing so; one is also presumed to be listed as an agent in a corresponding register not accessible to outsiders to the agency concerned (as a rule, a nomenclature of agents comprises more

than one category, and the exact titles of collaborators vary). On the other hand, the label of a quasi-agent of a secret service designates a person who has volunteered or has been otherwise drawn into collaborating with that agency without entering into a formal relationship with it: he or she does not receive orders from the agency but acts on his or her own discretion along the policy lines sustained by the regime, does not (save in exceptional cases) receive financial or other incentives from the agency, and is not listed in its register. The distinction between an agent and a quasi-agent of a secret service is a formal one, as they both report actions the regime discourages, or help to prevent such actions. Irrespective of this difference, in the eyes of the public at large, both agents and quasi-agents of a secret service of an undemocratic regime deserve condemnation (see paragraph 11 below).

7. Establishing who is an agent/quasi-agent of a secret service and who is not is no easy matter even in a democracy, but it is infinitely more complex in a totalitarian system. In the judgment the one-party regime in Hungary in the mid-1980s is called "totalitarian" (paragraphs 55, 65). Even allowing for the fact that, by then, the Hungarian regime had become less repressive than it was, say, in 1950s, this does not alter the fact that it was, in essence, an undemocratic one.

8. Under totalitarianism, by definition, the official tends to penetrate all things non-official. In a one-party totalitarian system, all institutions and offices (including those nominally far removed from politics) are "official" in the sense that all institutions function, and offices are held, as long as they accept the possible interference with their activities by officials from the regime (including the secret service), that is to say, the possibility of a contact approaching them (whether officially or otherwise, as was often the case), whenever the regime decides to bring pressure to bear on an institution or an office-holder. Contrary to stereotype, it is a regime not of only all-penetrating downward surveillance and repression but also of wide-scale bottom-up collaboration (whatever its motives may be); people have little choice but to more or less toe the line. Also, under one-party totalitarianism, by definition, formal orders or informal requests are often given to people by institutions and officials far more "innocent" than secret services. As to the secret services prompting "official contacts" in a totalitarian regime, anyone who has been "officially" (in the aforementioned sense) approached by a secret service officer with a request and did not refuse to comply (which would have been risky not only for the person concerned) but did what was required of him or her can be thought of, in a formal sense and if one is so inclined, as having collaborated with that agency and, thus, having been "an official contact" thereof, albeit grudgingly. This holds also for those who, either guided by their affection for a totalitarian regime or merely simulating loyalty thereto, have on their own initiative, "officially" entered into contact with its agents or otherwise attempted to contribute, or actually contributed, to the policies upheld by the regime. Does this automatically, in all cases, amount to one's being a quasi-agent of a regime or its secret service? In my opinion, the answer is no. In order for such categorisation, especially if made public, to be recognised as accurate, a lot more is needed.

9. The aforesaid does not exonerate people who collaborated – to a greater or lesser extent, whether willingly or against their will – with a totalitarian regime's secret service from their moral or, where applicable, legal responsibility. Some were hard-hearted hardliners and informants;

others compromised with the political climate; yet others succumbed to direct pressure (sometimes after agonising reflection). There was also a variety of other patterns and motives of behaviour. It is not necessarily possible, therefore, to deduce from the actual instance(s) of a person's communication or interaction with the secret service that he or she was in a "collegial" contact with it, or acted on his or her own initiative or at the instigation of the secret service, or in accordance with what they thought was expected of them. The Supreme Court rejected the automatic assumption and the "guilty by association" reasoning (see paragraph 11 below), but the majority have rejected this rejection. I believe that the Supreme Court's standpoint deserves to be upheld.

10. The conduct of anyone who, under totalitarian rule, chose to behave in a loyalist manner must be judged not only from today's perspective but also in the light of the reality of the situation at the material time, including prevalent patterns of behaviour in a comparable situation in that society, the behavioural options (if any) open to that person in that situation, the realistic consequences of alternative conduct and the assessment thereof by the person concerned. In the eyes of the law most of this is irrelevant. Whether every single loyalist to such a regime or anyone who informed its agents of any activities the regime discouraged, or anyone who carried out a request or order of its secret service, can be categorised as (and, where this is done publicly, accused of being) "an official contact", "an informant", or "a quasi-agent" of that regime's secret service is a matter of political opinion, a moral judgment, an academic topic, and not a question to be decided in court. What is legally relevant is that, if a dispute arises regarding such public categorisation, which is tantamount to condemnation in the eyes of the public at large, whoever disseminated the accusation must be able to prove its accuracy, to prove that it is based on facts which have been interpreted without prejudice.

11. I share the majority's view that a historian's freedom to formulate judgments of this kind (provided they are based on facts) is protected by Article 10 of the Convention. Yet I disagree with the assessment that the Supreme Court, when finding against Mr Ungváry, overstepped the line drawn by the provisions of that Article. True, the facts related to Mr K.'s position (not a top one) in the party hierarchy and to his ordering of the removal of the poster and his writing of the report were not contested by Mr K. himself. However, the Supreme Court's argument (quoted in paragraph 19 of the judgment) must not be ignored: "it is not possible to deduce from this potentiality [the possibility that the Ministry of the Interior indeed considered certain officials as 'official contacts' and that some of the so-called 'official contacts' occasionally cooperated with the State security and were active in the manner described by Mr Ungváry as 'unambiguously incarnating the activities of an agent'] the general conclusion that every single [official] acted as an 'official contact'; consequently, in the absence of proven facts, it is not acceptable to qualify all potentially available personalities ... as 'official contacts' actually cooperating with the State security. Public opinion condemns those persons who cooperated with the State security, even if they do not fall within the actual category of 'agent' or 'informant'. Therefore, if someone is characterised, without a proper ground, as actually having carried out such activities, this violates that person's reputation, according to public opinion." Mr Ungváry offered no proof of his characterisation of Mr K., even at the national courts'

insistence. The Supreme Court also took into consideration the fact that, in the television interview, Mr Ungváry called Mr K. (who by then had already denied the allegations) "trash", obviously not a scholarly term but an open insult, and apologised for having done so only in the course of the ensuing criminal proceedings.

12. The Supreme Court did not deny Mr Ungváry's right to have his own assessment of Mr K.'s conduct at the material time, or to express that assessment in public. If it had done so, that would indeed have been a violation of Article 10 of the Convention. What the Supreme Court urged the author to do was to prove his public assessment of Mr K.'s conduct, which Mr Ungváry appeared not to be able to do. This requirement is in line with the ethical imperatives applicable to anyone emitting any fact or value-judgment in respect of any person, in general, and with the ethical imperatives of academic research and journalism, in particular.

13. According to the majority, "the Supreme Court did not assess the impact on Mr K.'s personality rights in the light of the role of the press and did not apply the 'most careful scrutiny'", and "it did not consider the fact that many of the allegations regarding the involvement of Mr K. in the actions directed against the students' movement had been proved true" (paragraph 57 of the judgment). In my opinion, not only did the Supreme Court assess the said balance but, having done that, it found that Mr Ungváry had upset it to the detriment of Mr K.'s personality rights. The quotation from the Supreme Court's judgment (see paragraph 11 above) attests just that. The Supreme Court did not overstep its margin of appreciation in qualifying the author's statement as a statement of fact and not as a value-judgment (cf. paragraph 46 of the judgment) but took the view that, although there was a public interest in discussing the issues concerned, there was no public interest in irresponsible, defamatory language in respect of a person without proper substantiation.

14. The core of my disagreement with the majority's position is the methodology of interpretation of polysemous terms. "Official contact" is a "wide" term, "capable of evoking ... different notions as to its content and significance" (paragraph 52 of the judgment). Still, a court should not give the benefit of the doubt to an author who has used (especially by design) an ambiguous or vague word or expression in order to portray a person in an unfavourable light. If a word or expression used in respect of a person has, say, two meanings one of which is contemptuous, scathing, disdainful, scornful or otherwise hurtful and the other is unbiased, unprejudiced, disinterested, dispassionate or otherwise impartial, but a reader will tend to understand the former meaning, if any dispute arises the author should be required to justify using that particular term, failing which he or she should be held liable, if the law so provides, for not having chosen a more fair-minded vocabulary. The same holds for words and expressions that may be understood as statements of fact by some and as value-judgments (opinions) by others. Relying on freedom of expression as a fundamental value protected by the Convention, *inter alia*, is not convincing enough to allow an author to evade responsibility for inviting a reasonable reader (not necessarily most of them) to form the opinion that a certain characteristic attributed to a person is actually an impartial statement of fact. The majority have concluded that a broad connotation should be given to a whole set of terms: not only "official contact" but also "cooperation", "reporting", "informant" and "collegial contact" (see paragraphs 59, 60 of the judgment).

The frequency with which the terms thus collectively exculpated are used attests to precisely the opposite conclusion: that they were used in respect of Mr K. in a restrictive sense. Clemency towards the expanded connotation of the disputed terms (justified from the linguistic or semantic perspective but not from the legal one) has allowed them to be interpreted in this case as "opinions with sufficient factual basis". I object to this interpretation because it conceals the fact that a reasonable reader will naturally grasp their restrictive meaning, and, thus, perceive them not as value-judgments but as statements of fact. As to the meaning of the terms in issue preferred by the author himself, and his prejudice against Mr K., they are revealed and corroborated by the fact that the author did not bother to change them in a publication which followed the court-ordered rectification of the statement of fact, as well as by his vocabulary in the television interview (see paragraph 11 above). Therefore, I cannot join the majority in reproaching the Supreme Court for failing to follow the broader rather than the restrictive connotation of the terms "cooperation", "official contact", "reporting", "informant", "collegial contact" and so on.

15. Mr Ungváry's assessment of Mr K's personality is based on his perception of the motives that led Mr K. to act as he did. For him, in the mid-1980s Mr K. anticipated and exceeded the expectations of the State security, being an informant of the regime and a hard-line Communist policy supporter. A historian, like anyone else, has the right to be critical of any activity that compromised with the totalitarian regime instead of resisting it, and the right to maintain that every single person who held a position (however low) in the party hierarchy was a pillar on which that regime rested. The right to hold such an opinion is protected by the Convention. A historian can also categorise, in his own academic taxonomy, those who collaborated or at least compromised with the totalitarian regime as "official contacts" or "informants", or "quasi-agents", or "agents", for example. It is not for a court to decide whether such extra-legal categorisation is appropriate. Still, in this Court's jurisprudence, an essential distinction is drawn between the right to hold an opinion and the right to express it openly and publicly. An analyst has to accept the condition that if and when any of the aforementioned labels is publicly attached to a person and this can result in public condemnation of the person concerned (especially if the category was coined in an academic discourse and was not actually used to classify people at the material time), the burden of proof of the accuracy of the categorisation lies upon the analyst. If the latter fails to prove it, then one has to accept that a sanction provided for in law can be imposed on him or her. Mr Ungváry failed, in the domestic court proceedings, to prove the veracity of his categorisation of Mr K. as an "official contact", an "informant" or a "quasi-agent" of the former regime. Therefore, in my opinion, the Supreme Court, in deciding that Mr Ungváry infringed Mr K.'s personality rights, did not deviate from the standards set forth in the Court's case-law.

16. Mr Ungváry's assessment of Mr K.'s conduct in 1983 may be correct or incorrect. The majority have not contradicted his interpretation, but nor have they endorsed it. Alternative interpretations may be as plausible as the one discussed here, especially if an analyst makes an effort to pronounce judgement on an individual's past conduct not only from today's perspective but also having regard to the reality of the situation at the material time (see paragraph 10 above; although this may not be an easy

thing for a person born in 1969 to do in respect of one born in 1951), and with a deeper understanding that the motives behind a person's politically relevant conduct, especially under totalitarianism, do not fit into an oversimplified "black or white" scheme, of "cooperation or non-cooperation", but are often much more complicated. For instance, one could take into account that in the former Communist totalitarian regimes in Europe many reports were written along official hierarchy lines not only because people were eager or happy to write them but also because they were an important element of "official" discipline. Account could also be taken of the fact that such reports might be written not in order to inform the regime of activities it discouraged and persecuted, but because people were well aware of the likelihood that they themselves would be reported on by someone else. One might also imagine that Mr K.'s conduct in the students' movement case in ordering the removal of a poster by a university party official was meant as a message to the State security that it need not interfere because the matter had been settled. Such speculations are every bit as plausible as Mr Ungváry's. None of them is advocated here; they illustrate that writing a report within an official hierarchy does not necessarily stamp the writer as a hard-liner working for the secret service, anticipating its orders and so on. Post-Communist countries' history is full of examples of individuals who, having been loyal to the regime and even having held important positions under it, later turned out to be among those who effectively brought about its downfall, not to mention those who put on a show of co-operating with the regime but only out of wariness, precaution, prudence, or fear, and not because they sympathised with the ruling party's policy.

17. Because Mr Ungváry was unable to prove the veracity of his assessment of Mr K.'s conduct, his assessment cannot be considered legally defensible. The Supreme Court did not grant it legal protection, and I support this view because there was no evidence that such arbitrary categorisation of Mr K. contributed to any progressive development in a democratic society. Now the Court has found in favour of Mr Ungváry, thereby lending his statements at least some legal credence, notwithstanding the failure of their author to substantiate them. Such a finding cannot but encourage the publication, as opinions, of abusive statements wittingly expressed in polysemous terms, even if the authors cannot prove their veracity, when in fact the reader perceives them as statements of fact not distorted by prejudice. Thus, this finding may have an undesirable cascade effect.

18. One more point has to be made. At the material time Mr K. was, and at the time of examination of this case still is, a sitting Constitutional Court judge. The publication of the offending article coincided with his re-election to that position. In the "general principles" part of the judgment, it is stated that "the limits of acceptable criticism may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. However, the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence; and it may therefore prove necessary to protect judges from offensive and abusive verbal attacks" (paragraph 44). Yet this principle was not brought into play in the Court's assessment of the case in respect of the author of the offending article.

PARTIALLY DISSENTING OPINION OF JUDGE LORENZEN

Like Judge Kūris, I voted for finding no violation of Article 10 of the Convention in respect of the first applicant; and my reasons for that largely correspond to those advanced in his separate opinion.