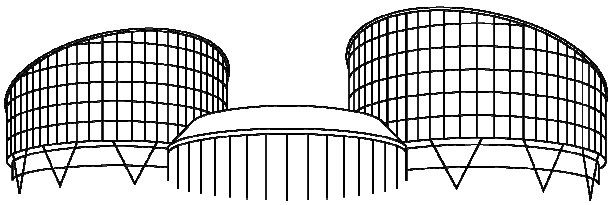

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF JOHN ANTHONY MIZZI v. MALTA

(Application no. 17320/10)

JUDGMENT

STRASBOURG

22 November 2011

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

In the case of John Anthony Mizzi v. Malta,

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

Nicolas Bratza, *President,*
Lech Garlicki,
David Thór Björgvinsson
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku, *judges,*
David Scicluna, ad hoc *judge,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 3 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 17320/10) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Maltese national, Mr John Anthony Mizzi ("the applicant"), on 4 March 2010.

2. The applicant was represented by Mr T. Azzopardi, a lawyer practising in Valletta. The Maltese Government ("the Government") were represented by their Agent, Dr Peter Grech, Attorney General.

3. The applicant alleged that the domestic court judgments finding him guilty of defamation and ordering him to pay civil damages were in breach of his right to freedom of expression under Article 10 of the Convention.

4. On 26 August 2010 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. Mr V. De Gaetano, the judge elected in respect of Malta, was unable to sit in the case (Rule 28 of the Rules of Court). The President of the Chamber accordingly appointed Mr David Scicluna to sit as an *ad hoc* judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1925 and lives in Malta.

A. Background of the case

7. The applicant is a journalist. On 20 February 1994 *The Sunday Times of Malta*, a national English language newspaper ("*The Times*") published the applicant's letter to the editor entitled "A Yacht Marina for Xemxija?"

The letter, in so far as relevant, read as follows:

> "Dr Francis Zammit Dimech, Minister of Transport, has been quoted as saying that a yacht marina is being projected for Xemxija, the inner part of St. Paul's bay.
>
> The residents of the seaside village, permanent and occasional, and the fishermen, have not been consulted over what will be an impractical and highly unpopular attempt to bring about further havoc in the area.
>
> After the war, during the administration of Dr Boffa, permission was given for buildings to be erected on the northern part of the bay because Dr Boffa wanted to build there, and now this has erupted into a conglomeration of high and low-rise constructions of grotesque proportions.
>
> Then came the oil tanks and it was quite a relief later to see those go. There was some idea to develop Mistra and one hopes this has evaporated. Now comes this new idea of a marina at Xemxija.
>
> When the breakwater at Tal-Veccja was extended, the currents in the bay were diverted so that now silt has settled along the stretch by the West End Hotel. Similarly, any breakwater in the bay will further alter the currents. The residents will not welcome the intrusion of yachtsmen and are wondering whether the back up facilities will go.
>
> A proper study of the storms in the bay in winter will certainly show though how impractical it is to build a large marina at Xemxija. Besides, one can imagine yachtsman with pegs to their noses from the stench from the drainage outflow which is such a feature of St. Paul's Bay where the authorities have continually botched the system.
>
> Why don't they try Salina, which is a more sheltered and more practical marina – if in fact there is need for another marina?"

B. Defamation proceedings

8. On an unspecified date, Mr J. Boffa, the son and heir of the deceased Sir Paul Boffa referred to in the letter (who was Prime Minister of Malta and Head of Government in the post-war era of 1947-50 and who died in 1962), sued the applicant for civil damages, claiming that the letter was defamatory. He argued that the words "*Dr Boffa wanted to build there*" attributed false and despicable intentions to his father.

9. The applicant pleaded that the action should be dismissed on the ground that a deceased person cannot sue for libel. By a preliminary judgment of 28 June 1996 the Civil Court dismissed this preliminary plea. This preliminary decision was upheld by the Court of Appeal on 7 October 1997.

10. The applicant contended, on the merits, that his letter had not stated that Sir Paul Boffa had wanted to build for *himself* in the specified area. His statement had referred to Sir Paul Boffa's decision, acting in his role as Prime Minister of the country, to build in the area. Moreover, the letter was not injurious and there had been no mischievous intent, "*animus injuriandi*", on the part of the applicant, who was also a family friend of the Boffas.

11. By a judgment of 21 October 2002 the Civil Court found the letter to be defamatory *vis-à-vis* Sir Paul Boffa and ordered the applicant to pay Joseph Boffa 700 euros (EUR). It reiterated that a person may have a legal interest even if he or she was not the person to have been defamed, and it threw out the applicant's explanation of the impugned phrase for the following reasons: from the evidence submitted it transpired that the area close to the Church in Xemxija was indeed a development zone; however, no date could be established as to when the land had been earmarked for such purpose. It further appeared that a company had submitted an application to acquire (*tehid*) land in Mistra to erect a bulk storage installation for petroleum products. It followed logically, according to the reasoning of the Civil Court, that the applicant had meant that the issuing of building permits during Sir Paul Boffa's administration had been dependent on his will to build there (on the northern side of the bay of Xemxija), personally. This was the meaning which would have been understood by any ordinary right-thinking person. However, the applicant had not been able to prove that any such permits had been issued, or that Sir Paul Boffa had wanted to build there. Thus, since the allegations were untrue, and the applicant had not proved any basis for such an allegation, mischievous intent was presumed.

12. The judgment was upheld by the Court of Appeal on 21 June 2005. It reiterated that the statement "*during the administration of Dr Boffa, permission was given for buildings to be erected on the northern part of the bay because Dr Boffa wanted to build there*" was defamatory as it implied

that Dr Boffa had taken advantage of his position as head of the civil administration to build in an area for which planning permission had not previously been granted. This was what a reasonable person would have understood. However, Mr Boffa had proved that his father never owned property in the said area. The Court of Appeal further noted that the applicant had failed to publish any correction or apology after becoming aware that Mr Boffa had suffered from the defamation caused by the publication.

C. Constitutional redress proceedings

13. The applicant instituted constitutional redress proceedings claiming that there had been a violation of his rights under Articles 6 and 10 of the Convention.

14. On 18 November 2008 the Civil Court, in its constitutional jurisdiction, dismissed his claims on the merits. It considered the evidence produced by the applicant, namely a letter from the editor of *The Times* which explained the reasons why he disagreed with the court judgment of 21 June 2005, the witness testimony declaring that the relevant area was a building site, his research documents and his statement that he had never referred to Dr Boffa's wish to build for himself personally. It considered, firstly, that according to established domestic and continental jurisprudence, a descendant of a defamed person did have a right of action. It reiterated the lower courts' findings in relation to the *animus injuriandi* and confirmed that their decision based on the finding that the applicant's statement had been untrue could not be considered to be repressive. It held that an ordinary reader would have definitely understood the applicant's statement to refer to Dr Boffa's wish to build there personally and thus did cause harm to his reputation. Moreover, the concept of "necessary in a democratic society" did not entail the publishing of falsehoods. As to Article 6, it held that according to the European Court's case-law, the right to a fair trial did not extend to the failure to cross-examine persons who had not given testimony and whose interests were being represented by the heirs who could, themselves, be cross-examined. Thus, there could be no violation of Articles 6 or 10 of the Convention.

15. On appeal, by a judgment of 9 October 2009, the Constitutional Court upheld the first-instance judgment and the ordinary court's reasoning under both Articles 6 and 10. In particular, it rejected the applicant's contention that he was referring to Dr Boffa in his role as Prime Minister at the relevant time and not in his personal capacity, and that the applicant had never written that Dr Boffa had wanted to build there for his own personal advantage. It further held that the Court of Appeal had correctly applied the relevant principles, in particular the concept of "ordinary reader" and the importance of reputation.

II. RELEVANT DOMESTIC LAW

16. The pertinent sections of the Press Act, Chapter 248 of the Laws of Malta, in so far as relevant, read as follows:

Section 3

"The offences mentioned in this Part of this Act are committed by means of the publication or distribution in Malta of printed matter, from whatsoever place such matter may originate, or by means of any broadcast."

Section 11

"Save as otherwise provided in this Act, whosoever shall, by any means mentioned in section 3, libel any person, shall be liable on conviction to a fine (*multa*)."

Section 23

"Criminal proceedings for any offence under Part II and civil proceedings under Part III of this Act may be instituted against each of the following persons:

(*a*) the author, if he shall have composed the work for the purpose of its being published, or if he shall have consented thereto;

(*b*) the editor; or, if the said persons cannot be identified,

(*c*) the publisher."

Section 27

"Criminal proceedings are independent of civil proceedings. Both proceedings may be instituted at the same time or separately."

Section 28

"(1) In the case of defamation, ... , the object of which is to take away or injure the reputation of any person, the competent civil court may, in addition to the damages which may be due under any law for the time being in force in respect of any actual loss, or injury, grant to the person libelled a sum not exceeding eleven thousand six hundred and forty-six euros and eighty-seven cents (EUR 11,646.87)."

17. Articles 255 and 256 of the Criminal Code, Chapter 9 of the Laws of Malta, read as follows:

Article 255

"No proceedings shall be instituted for defamation except on the complaint of the party aggrieved:

Provided that where the party aggrieved dies before having made the complaint, or where the offence is committed against the memory of a deceased person, it shall be lawful for the husband or wife, the ascendants, descendants, brothers and sisters, and for the immediate heirs, to make the complaint."

Article 256

"(1) In cases of defamation committed by means of printed matter, the provisions contained in the Press Act shall apply.

(2) Where, according to the said Act, proceedings may only be instituted on the complaint of the party aggrieved, the provisions contained in the proviso to the last preceding article shall also apply."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

18. The applicant complained that the domestic court judgments finding him guilty of defamation and ordering him to pay civil damages were in breach of his 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."

19. The Government contested that argument.

A. Admissibility

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

21. The applicant argued that Maltese law, namely section 28 of the Press Act concerning civil actions, did not allow relatives of a deceased person to institute proceedings, unlike in criminal proceedings. This notwithstanding, the domestic courts had allowed this action.

22. The applicant submitted that the domestic courts had utterly twisted his words written in plain English, maybe because they had translated them literally into Maltese, although the phrase would have had exactly the same meaning in both languages. However, his statement, in English, had been clear and it had not included the word "for himself". In consequence, this meaning could not be presumed. Thus, the implication that Dr Boffa had wanted to build there "personally" was a point that the domestic courts had added of their own accord.

23. The applicant submitted that the letter had not been directed at Dr Boffa at all but had meant to show the impracticality of a yacht marina in the area nowadays. The only reference to Dr Boffa had been to him as Prime Minister, more than fifty years ago, at a time when construction in the area had boomed, as also proved before the domestic courts. Indeed, it made no sense to extrapolate one innocuous sentence which had nothing to do with the aim of the article as a whole, impute to it a meaning which was not at all evident, and find that that was libellous. This was even more so given that the Prime Minister was in any case a public figure.

24. The applicant alleged that he had offered to make a correction in the newspaper explaining that no such meaning had been intended; however, Joseph Boffa had only been prepared to accept an apology for the defamation suffered, an allegation the applicant had refused to accept.

25. Lastly, the applicant considered that the sum he had had to pay in damages had not been insignificant and in any case the interference had definitely not been necessary in a democratic society. Indeed the reasons adduced by the domestic courts had been feeble and could not justify such interference.

26. The Government acknowledged that the order to pay damages had constituted an interference with the applicant's Article 10 rights.

27. However, they contended that the interference was provided for by law. Section 28 of the Press Act and Articles 255 and 256 of the Criminal Code made it foreseeable that a person who committed libel against a deceased person was liable to a civil action under the Press Act.

28. Moreover, the interference had pursued a legitimate aim, namely the protection of the reputation and rights of others, and had been necessary in a democratic society. Making reference to the Court's case-law, the Government recognised the importance of the role of journalists in

imparting information and ideas, but stressed that they were subject to duties and responsibilities in respect of the manner in which they performed their functions and as to what they chose to publish. In the present case, the applicant had chosen to publish words, which, according to the Government, an ordinary intelligent reader would have understood to mean that Sir Paul Boffa, when Prime Minister, had arranged for building permits to be issued in Xemxija to further his own personal interest in building in that area and thus casting a shadow of corruption on Dr Boffa's immediate family, who were ordinary private citizens. The applicant chose to publish this information despite the lack of evidence substantiating its veracity. Moreover, the article had been published in a leading, respectable newspaper where readers would have taken for granted that what had been published was the truth. Furthermore, no correction or rectification had been published by the applicant.

29. The Government noted that while the applicant insisted that a different meaning was attributable to the phrase at issue, four separate domestic courts had rejected his arguments. Indeed, the meaning given to it by the applicant was untenable since until the 1960s the area was only viewed as a location for summer residences and it was only much later that it started hosting ordinary residences. While at the relevant post-war time it had been earmarked as a building site, the only application for development had in fact been that by an oil company for construction of tanks and storage purposes. The Government considered that the impugned phrase was a straightforward statement of fact that could only have the meaning given to it by the domestic courts, particularly bearing in mind that the predominantly Maltese-speaking public would assimilate phrases in English and mentally translate them into their mother tongue, Maltese. Lastly, they considered that since the case concerned an interpretation of what the ordinary reader in Malta would have understood, it was not for the Court to re-evaluate the matter, the domestic judge being in a better position to perform such an assessment.

30. Bearing in mind the low amount of damages awarded to the injured party and the context, namely private civil proceedings, the Government considered that the interference had been justified.

2. The Court's assessment

(a) General principles

31. The Court reiterates that an interference breaches Article 10 unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in Article 10 § 2 and was "necessary in a democratic society" to attain such aim or aims (see *Times Newspapers Ltd v. United Kingdom (nos. 1 and 2)*, no. 3002/03 and 23676/03, § 37, 10 March 2009). The test of "necessary 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).

32. The Court's task in exercising its supervisory function is not to take the place of the national authorities, but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their margin of appreciation. The Court must look at the interference complained of in the light of the case as a whole, including the content of the comment held against the applicant and the context in which it was made (see *News Verlags GmbH & Co. KG v. Austria*, no. 31457/96, § 52, ECHR 2000-I, and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 69, ECHR 2004-XI). 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 *Aquilina and Others v. Malta*, no. 28040/08, § 41, 14 June 2011).

(b) Application in the instant case

33. The Court notes that it is common ground between the parties that the judgments pronounced in the defamation action constituted an interference with the applicant's right to freedom of expression as protected by Article 10 § 1.

34. The Court considers that the interference was "in accordance with the law", namely section 28 of the Press Act, read in conjunction with Articles 255 and 256 of the Criminal Code, and that it pursued the legitimate aim of protecting the reputation or rights of others, within the meaning of Article 10 § 2. It remains to be ascertained whether it was "necessary in a democratic society".

35. The Court notes that the impugned statement read "Dr Boffa wanted to build there" and that the domestic courts interpreted the statement as meaning that "the Prime Minister at the time wanted to build there *for himself*". The Court considers that having attributed one of two meanings in which it could have been understood, it stood to reason that the veracity of the statement, as interpreted by the domestic courts made it very difficult, if

not impossible, for the applicant to provide direct corroboration of it (see, *mutatis mutandis*, *Bozhkov v. Bulgaria*, no. 3316/04, § 47, 19 April 2011). Indeed, in the Court's view, while it is true that the applicant could have phrased the impugned statement in a more careful manner, the meaning given to it by the applicant, as can be seen from the English text as published, appears to be a reasonable meaning that could be attributed to it by an ordinary, average reader. Furthermore, the letter had been published in English and was therefore directed at an English-speaking public. The Court considers that the evidence put forward by the applicant in the domestic proceedings, together with the fact that the area was eventually built on in the subsequent years constituted a sufficient factual basis for the statement as intended by the applicant, which in the Court's view did not amount to a serious allegation. The Court's case-law is clear on the point that the more serious the allegation is, the more solid the factual basis should be (see, for example, *Rumyana Ivanova v. Bulgaria*, no. 36207/03, § 64, 14 February 2008).

36. Moreover, even accepting the meaning attributed to the words by the domestic courts, the Court notes that those courts found that mischievous intent was to be presumed, while disregarding factors which could equally be relevant for determining whether or not the applicant had acted in good faith (see, *mutatis mutandis*, *Bozhkov*, cited above, § 50).

37. Quite apart from the interpretation given to it by the domestic courts, the Court considers that the statement must be looked at in the light of the overall thrust of the letter. The Court has previously held that the criterion of responsible journalism should recognise the fact that it is the article as a whole that the journalist presents to the public (see *Bozhkov*, cited above, § 50). The Court notes that the impugned statement, whatever its meaning may be, was a mere historic sideline to an article which dealt with a totally different subject matter. It held no prominence in the writing; it was of little significance, was written in the calmest of tones and could hardly be considered as provocative or exaggerated in that specific context.

38. Furthermore, the domestic courts did not give any weight to the fact that the person who they found to have been defamed was a former prime minister, and thus a politician and public figure who was subject to wider limits of acceptable criticism (see *Lombardo and Others v. Malta*, no. 7333/06, § 54, 24 April 2007) and that the article covered a subject of at least some public interest.

39. The Court further notes that the said prime minister was deceased at the time the letter was written. Indeed, the person who sued the applicant and to whom damages were awarded was not the defamed person, but his heir. In this respect, although the possibility of bringing such an action existed in the Maltese legal system, like in other countries, and though this has never raised an issue, as such, before the Court (see, for example, *Editions Plon v. France*, no. 58148/00, § 14, ECHR 2004-IV, and *Hachette*

Filipacchi Associés v. France, no. 71111/01, § 10, ECHR 2007-VII), it is of the view that this element should have been considered by the domestic courts when assessing the proportionality of the interference. Indeed, when considering the harm that may be caused to a person's reputation, the immediate consequences that come to mind are, *inter alia*, loss of opportunities, private or professional, or loss of standing in the eyes of the community. The Court notes that, in the present case, the defamed individual passed away more than three decades before the impugned statement was published and any damage that may have been caused to the deceased's reputation cannot be considered serious in the circumstances (see *Editions Plon*, cited above, § 53 and, conversely, § 47). The Court observes that the domestic courts gave no weight to this factor.

40. In conclusion, the Court considers that the domestic courts' decisions, narrow in scope, reiterating what, in their view, was implied by the impugned statement, and upholding the right of reputation without explaining why this outweighed the applicant's freedom of expression and without taking into consideration other relevant factors, cannot be considered to fulfil the obligation of the courts to adduce "relevant and sufficient" reasons which could justify the interference at issue.

41. The fact that the proceedings were civil rather than criminal in nature and that the final award was relatively modest does not detract from the fact that the standards applied by the courts were not compatible with the principles embodied in Article 10.

42. There has accordingly been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

43. The applicant complained of a violation of his right to a fair trial, in that he could not cross-examine his accuser who was in fact deceased. He relied on Article 6 § 3 (d) of the Convention, which provides as follows:

> "3. Everyone charged with a criminal offence has the following minimum rights: ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

44. The Court notes that the proceedings complained of did not concern the determination of any criminal charge against the applicant (see, *mutatis mutandis*, *Walsh v. the United Kingdom* (dec.), no. 43384/05, 21 November 2006). It follows that Article 6 § 3 (d) does not apply, and the complaint is incompatible *ratione materiae* with the provisions of the Convention and should be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

45. Even viewed against the general fairness requirements of Article 6 § 1, the Court finds that in the circumstances of the present case the applicant was not denied a fair trial. It follows that the complaint is manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The applicant claimed 6,000 euros (EUR) in respect of non-pecuniary damage and EUR 700 in respect of pecuniary damage, representing the amount he was made to pay in civil damages.

48. The Government objected to these claims particularly considering the trivial amount of civil damages the applicant was made to pay.

49. The Court reiterates that under its case-law a sum paid as reparation for damage is only recoverable if a causal link between the violation of the Convention and the damage sustained is established. Thus, in the present case, the award of damages which the applicant had to pay to Joseph Boffa pursuant to the domestic courts decisions could be taken into account (see, *mutatis mutandis*, *Thoma v. Luxembourg*, no. 38432/97, § 71, ECHR 2001-III). Thus, the Court awards the applicant EUR 700, in respect of pecuniary damage and EUR 4,000 in respect of non-pecuniary damage.

B. Costs and expenses

50. The applicant also claimed EUR 5,066.38, namely EUR 4,293.55 as per the submitted bill of costs and EUR 772.83 Value Added Tax (VAT), for the costs and expenses incurred before the domestic courts and EUR 2,360 including VAT for professional fees incurred before the Court.

51. The Government considered that the sum of EUR 1,500 for the proceedings before this Court would suffice. As to the sums claimed for the domestic proceedings, they submitted that VAT should not be included as it was payable only on professional fees and not registry expenses. Moreover, they contended that the applicant had to prove that he had paid the amount of EUR 1,197.72 representing the Government's expenses in the domestic proceedings.

52. 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. The Court firstly notes that even assuming the Government's expenses have not yet been paid, these expenses remain due. Thus, in the present case, regard being had to the fact that certain of the applicant's complaints have been declared inadmissible, to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 5,300 covering costs under all heads.

C. Default interest

53. 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 complaint concerning Article 10 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* by six votes to one that there has been a violation of Article 10 of the Convention;

3. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 700 (seven hundred euros) in respect of pecuniary damage;
      (ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (iii) EUR 5,300 (five thousand three hundred euros), plus any tax that may be chargeable, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 22 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Nicolas Bratza
Deputy Registrar	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) concurring opinion of Judge Bratza;
(b) dissenting opinion of Judge Scicluna.

N.B.
F.A.

CONCURRING OPINION OF JUDGE BRATZA

1. I share the view of the majority of the Chamber that the applicant's rights under Article 10 of the Convention were violated in the present case and would add only a few words on what I regard as one of the important grounds for the Chamber's finding of violation, namely the fact that Sir Paul Boffa, who was held to have been defamed in the applicant's letter, had died before the letter was written.

2. As someone originating from a jurisdiction in which a cause of action for defamation does not survive the death of the alleged wrongdoer or that of the defamed person himself, I admit to having difficulty with the idea that an action in defamation can lie at the instance of descendants of an individual years, and even decades, after the death of the person concerned. I accept, however, that in other jurisdictions, including Malta, such a cause of action exists and has not, as such, been questioned in the Court's case-law.

3. The two cases referred to in the judgment were not in fact cases of defamation. Both were cases in which the impugned publication (in *Editions Plon*, the disclosure of confidential medical details of a head of state who had recently died and, in *Hachette Filipacchi Associés*, the publication of a photograph of the mutilated body of a political figure, shortly after his murder and funeral) had a direct and immediate impact on the private and family lives of the immediate family of the deceased.

4. In the case of defamation, the situation appears to me to be different: the defamatory statement, while doubtless affecting the reputation of the deceased ancestor, has in my view no direct impact on the private or family life of the descendants. The exposure of an individual in such a case to an action in damages for defaming the deceased ancestor of a family is likely to have a seriously chilling effect on the right of freedom of expression, particularly in a case where many years have passed since the death and the burden of proving the truth of the allegation lies on the defendant in any such action. In my view, even if such an action is in principle compatible with the requirements of Article 10, when striking the balance between the competing interests, the weight to be attached to the reputation of the deceased individual must diminish with the passing of the years and that attaching to freedom of expression must correspondingly increase.

5. As noted in the judgment, Sir Paul Boffa, who was found to have been defamed in the applicant's letter, died more than three decades before the impugned statement was published. While I readily accept that he was a greatly respected figure in Malta, I consider that any damage that may have been caused to his reputation by the letter was in the circumstances outweighed by the freedom of expression of the applicant guaranteed by Article 10 of the Convention.

DISSENTING OPINION OF JUDGE SCICLUNA

1. Having carefully examined the letter in question which purportedly deals with the topic of the bulding of a yacht marina at Xemxija, the paragraph in which the writer refers to Dr Boffa sticks out because of the allegation made in it.

2. In my opinion the interpretation given by the national courts to this paragraph was the correct one. Saying that permission was given during the Boffa administration for buildings to be built "because Dr Boffa wanted to build there" means that Dr Boffa had an interest in allowing the construction of buildings in the area. It cannot be understood as meaning that it was his administration that wanted to develop the area. Indeed the writer says that permission to build was given "during the administration of Dr Boffa" but then that it was given "because Dr Boffa wanted to build there".

3. I disagree that any other interpretation could be given to the statement made by the applicant in his letter. If a different meaning was meant to be given by the applicant (viz. that Dr Boffa was in favour of the area being built up – "*ried li jinbena*" and not "*ried jibni*") then that is what he should have said.

4. I agree with the principle enunciated in paragraph 38 of the judgment but the fact that the reference was to a former prime minister is in this case besides the point given that the applicant himself says that the national courts misunderstood what he had written.

5. The fact that Dr Boffa passed away more than three decades ago does not mean that any damage cannot be considered serious. Dr Boffa is still considered a highly respectable and honest politician and his heirs have an interest in upholding not only his honour, his reputation and his name but also that of the family as any defamation almost inevitably rubs off onto the family and this can lead to moral and material damage. These reasons, which were also indicated by the national courts, should be considered as relevant and sufficient reasons to justify the interference with the applicant's right of freedom of expression.