



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

FIRST SECTION

CASE OF ANDRUSHKO v. RUSSIA

(Application no. 4260/04)

JUDGMENT

STRASBOURG

14 October 2010

FINAL

14/01/2011

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

In the case of Andrushko v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyeu,

Dean Spielmann,

Sverre Erik Jebens, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 23 September 2010,

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

PROCEDURE

1. The case originated in an application (no. 4260/04) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Ms Svetlana Vasilyevna Andrushko (“the applicant”), on 11 December 2003.

2. The Russian Government (“the Government”) were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged violations of the right to freedom of expression and the right to fair civil proceedings.

4. On 9 September 2005 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

5. The Government objected to the joint examination of the admissibility and merits of the application. Having examined the Government’s objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1951 and lives in Omsk.

7. She stood as a candidate for the elections to the legislative assembly of the Omsk Region scheduled for 24 March 2002. One of her competitors was Mr K., a local businessman.

8. On 20 March 2002 thirty-nine minority shareholders and former employees of the local department store “Oktyabrskiy” asked the applicant to finance a campaign against Mr K., the majority shareholder of Oktyabrskiy and the chairman of its Board of Directors.

9. On the same day the applicant arranged for the printing of 1,500 copies of the following leaflet, drafted by the shareholders:

“The Truth about K[.]

We, shareholders of the Oktyabrskiy department store, have suffered from K[.] We are thirty-nine employees *taken hostage by that voracious big wheel. K[.]*:

- *depreciated our stock;*
- *coerced us into selling the stock for a song, threatening us with dismissal;*
- *forced thirty-nine employees to resign by not letting them work;*
- *paid a miserable salary and often paid us with rotten groceries;*
- *having ousted the shareholders by unlawful means, he has become the department store owner.*

For more than a year we have been fighting for our rights in courts and other instances. *The law-enforcement agencies are still powerless. In Omsk and its region many people have suffered because of K[.]’s unlawful conduct; but everyone is silent and money does not smell.*

We, as victims of K[.]’s conduct, propose to write a book entitled ‘The story of K[.]’s dark fortune’. Let it include *the story of everyone who has met that terrible man on his or her way and become his victim*. His fortune was made from our tears. Do not taint yourself by supporting this man. *Whatever he undertakes is damned: every spring the renovated city hall is flooded with sewage, and the Patriarch did not come to bless the Church on the left bank which had been built in breach of Orthodox canons.*

We have suffered much harassment, repression and many a misfortune because of this man. *Do not trust his promises, they build on our sorrows and lack of rights.*

Voters! Sign your fair judgment of K[.]! *Say ‘no!’ to the fortune made from the woes and tears of simple people.*

We are firmly convinced that a man who breaks the Law should not be a parliamentarian and lawmaker.

On behalf of the shareholders: G. F[.], L. K[.], V. A[.]” (emphasis added)”

10. On 26 March 2002 the applicant was elected a member of the legislative assembly of the Omsk Region.

11. Mr K. challenged the election results before the Omsk Regional Court. In particular, he claimed that by publishing the leaflet the applicant had resorted to unlawful electoral campaigning. The parties to the

proceedings were Mr K. and the electoral commission. The applicant was cited as a third party.

12. On 4 June 2002 the Omsk Regional Court rejected Mr K.'s application. It found that the leaflet had called on electors to vote against Mr K., which was a permissible form of electoral agitation. The publication of that leaflet had not breached the electoral laws. If Mr K. believed that the leaflet contained untrue information damaging to his honour and reputation, it was open to him to bring defamation proceedings.

13. Mr K. sued the applicant and the three signatories of the leaflet for defamation. He submitted that the italicised extracts above were untrue and that the leaflet had damaged his reputation and gravely affected the voters' freedom of choice. He claimed compensation in respect of non-pecuniary damage.

14. The applicant produced her evidence, including the original leaflet bearing thirty-nine signatures, the decision to issue additional shares taken by the Board of Directors of the Oktyabrskiy department store under the chairmanship of Mr K., and an official document showing that the flooding of the ground floor of the city hall had been due to a construction defect which had subsequently been corrected. Several of the minority shareholders had given oral testimony to the court, confirming the information contained in the leaflet.

15. On 11 April 2003 the Kirovskiy District Court of Omsk allowed Mr K.'s claims, finding that the defendants had failed to prove the truthfulness of the contested extracts.

16. Firstly, the court referred to the judgment of the Omsk Regional Court of 4 June 2002. It found that it was bound by the finding contained in that judgment that the applicant had failed to prove the truthfulness of the statements in the leaflet.

17. The court further found as follows.

(a) The decision approving the issue of 300,000 additional shares had been adopted by a general meeting of shareholders rather than by Mr K. personally. That decision had previously been found lawful by a court. Although Mr K. was a majority shareholder, the fact that he had a decisive vote in certain issues "did not imply the unlawfulness of the decisions taken. For that reason the accusation blaming Mr K. for the depreciation of the shares and the ousting of shareholders, as if it were unlawful conduct, was unsubstantiated. The defendants had failed to prove that Mr K. had acted unlawfully".

(b) It had not been shown that the depreciation had been the result of Mr K.'s conduct rather than of another cause. Moreover, the defendants had sold their shares for 800 to 1,000 roubles each.

(c) That there had been compulsion to sell shares had not been established. Mr K., being the chairman of the Board of Directors, had suggested that shareholders should sell their shares at the price of 30 roubles

each. There was no evidence that he had resorted to extortion, violence or threats of violence.

(d) The allegation that Mr K. had “forced thirty-nine employees to resign by not letting them work” was also unsubstantiated. Mr K. had not personally signed any dismissals. The employees had resigned of their own free will and the resignations had been countersigned by the director general, Mr B. There had therefore been no causal link between Mr K.’s actions and the dismissals of the employees.

(e) The defendants had failed to prove that Mr K. had been personally responsible for the payment of “a miserable salary”. The salary of the employees of the Oktyabrskiy department store had been comparable to the average salary in the region. Moreover, “the notion of a miserable salary [was] subjective and the fact that such a salary [had been] paid did not imply that it was a consequence of Mr K.’s conduct. The unlawfulness of his conduct had not been proved”.

(f) The defendants had not submitted any evidence proving that shareholders had been ousted by unlawful methods or that Mr K. had obtained the ownership of the Oktyabrskiy department store unlawfully.

(g) The allegation that “whatever [Mr K.] undertakes is damned” was a “violation”. The statement that the city hall was flooded every spring was untrue as additional construction works in the city hall had fixed the flooding problem. As to the statement about the church, the Prior of the church had confirmed that it had been built in compliance with Orthodox canons. Moreover, Mr K. had received a “letter of benediction” for its construction.

18. The District Court concluded as follows:

“The leaflet was clearly intended for [electoral] campaigning and essentially purported to induce, and has induced, voters to take part in the election and vote against the candidate Mr K[.], which is not prohibited under election law.

It has been established that [the applicant] was not the source of the information in the leaflet, or its author; she merely disseminated it. As to the words, expressions and statements about [Mr K.’s] property and fortune and the way it was made, they reflect the opinion and civic position of a micro-community of shareholders and former employees in respect of an existing dispute between them and the joint stock company of which Mr K[.] is one of the directors. A judicial dispute concerning these matters is pending before the Omsk Commercial Court ...

As the court considers it proven that the dissemination of statements by the defendants has damaged Mr K[.]’s honour, dignity and professional reputation, it awards him 500 roubles against [the applicant] in compensation for non-pecuniary damage... The court takes into account the nature of the statements disseminated and the fact that the leaflet was signed not only by the defendants, but also by thirty-nine other persons, which substantially reduced the defendants’ liability for the non-pecuniary damage incurred by the plaintiff.”

19. In the operative part of the judgment the court cited the italicised statements in the leaflet and pronounced them untrue and defamatory.

20. The applicant appealed against the judgment. She submitted that the District Court had incorrectly considered itself bound by the judgment of 4 June 2002, which had concerned a dispute involving a different cause of action and different parties. It had concerned a dispute over the election results between Mr K. and the electoral commission; the applicant had been a third party to that dispute. The issues relating to defamation or compensation for non-pecuniary damage had not been examined in the judgment of 4 June 2002. The applicant further maintained that the defendants had submitted evidence proving the truthfulness of the contested allegations. In particular, the witnesses had confirmed that all the statements contained in the leaflet were true. The District Court's findings had been contradictory. In particular, although the District Court had found that Mr K., being the majority shareholder of the Oktyabrskiy department store, had influenced its policy, it had also found, conflictingly, that Mr K. had not been personally responsible for the impugned omissions. In conclusion, the applicant submitted that the judgment of 11 April 2003 had violated her right to impart opinions.

21. On 11 June 2003 the Omsk Regional Court upheld the judgment of 11 April 2003 on appeal. It held as follows:

"The conclusions of the [District] Court are correct, as it can be seen from the contents of the entire contested text that the authors presented Mr K[.], a candidate for election to the legislative assembly of the Omsk Region and head of [the Oktyabrskiy department store] as disreputable, as someone who infringes the Law and moral principles, who builds his fortune unlawfully and who harasses the shareholders of the Oktyabrskiy department store in various ways ...

The [District] Court allowed the claims as the defendants had not submitted evidence showing that the allegations contained in the leaflet were true. Moreover, the assessment of Mr K[.]'s personality was formulated in clearly insulting terms. ...

... the [District] Court correctly considered the finding made in the judgment of the Omsk Regional Court of 4 June 2002 that [the defendants] had failed to prove the truthfulness of the statements contained in the leaflet ... as evidence established by the courts ...

[The applicant's] arguments that the present case has a different cause of action and that the parties have different procedural status cannot warrant the re-establishment of a fact that has earlier been established by a court. As the Regional Court made an assessment of the truthfulness of the allegations contained in the leaflet, the courts are bound by that judgment ... in the determination of the present case.

[The applicant's] argument that ... the judgment violates citizens' constitutional right to freedom of thought, speech and information is unfounded. The views of a citizen or a group of citizens on a certain issue, if they are distributed in written form, must be formulated in proper language.

The expressions used in the leaflet, such as ‘voracious big wheel’, ‘that terrible man’, ‘his fortune was made from our tears’, ‘whatever he undertakes is damned’, ‘the story of K[.]’s dark fortune’ are clearly insulting, are formulated in cynical terms, give an assessment of the plaintiff’s personality and contradict the socially acceptable norms of conduct and religious principles ...

The appeal must be dismissed because the [District Court] correctly assessed the evidence, rightly concluded that the statements in the leaflet were untrue and gave judgment in accordance with the substantive and procedural rules.

However, the operative part of the judgment must be clarified. Since essentially the entire leaflet contains untrue statements damaging to Mr K[.]’s honour, dignity and professional reputation, the list of statements that were found to have been untrue must be deleted from the operative part.

Having regard to the particular circumstances of the case (electoral campaigning), the fact that the widely disseminated leaflet included untrue statements damaging to Mr K[.]’s honour, dignity and professional reputation set out in a deliberately insulting form, the degree of anguish experienced by the victim, the [Regional Court] considers it appropriate to increase, in accordance with Article 151 of the Civil Code, the award in respect of non-pecuniary damage to 5,000 roubles against [the applicant] and to 2,000 roubles against [the other defendants].”

II. RELEVANT DOMESTIC LAW

A. Electoral agitation

22. The Federal Law of 19 September 1997 on Basic Guarantees of Citizens’ Electoral Rights and the Right to Participate in Referenda (no. 124-FZ, in force at the material time, hereafter “the Electoral Rights Act”) provides that election candidates may distribute agitation materials (section 41 § 1).

23. It is prohibited to abuse the freedom of the mass media, in particular, by encouraging social, racial, ethnic or religious hatred or enmity, by calling for the usurpation of power or forcible change of the constitutional foundations of the Russian Federation or breach of the territorial integrity of the Russian Federation, by advocating war or by abusing the freedom of the mass media in any other way (section 43 § 2).

B. Defamation suits

24. Article 152 of the Civil Code provides that an individual may apply to a court with a request for the rectification of “statements” (“сведения”) that are damaging to his or her honour, dignity or professional reputation if the person who disseminated such statements does not prove their truthfulness. The aggrieved person may also claim compensation for losses

and non-pecuniary damage sustained as a result of the dissemination of such statements.

25. Resolution No. 11 of the Plenary Supreme Court of the Russian Federation of 18 August 1992 (amended on 25 April 1995 and in force at the material time) provided that in order to be considered damaging statements had to be untrue and contain allegations of a breach of laws or moral principles (commission of a dishonest act, improper behaviour in the workplace or in everyday life, etc.). “Dissemination of statements” was understood as meaning the publication of statements or their broadcasting (section 2). The burden of proof was on the defendant to show that the disseminated statements were true and accurate (section 7).

C. Compensation for non-pecuniary damage

26. Article 151 § 1 of the Civil Code provides that a court may award compensation for non-pecuniary damage to an individual who has incurred such damage as a consequence of acts that have violated his personal non-pecuniary rights. Article 150 lists, among other personal non-pecuniary rights, the dignity of a person and his/her honour, good name and professional reputation.

27. The amount of compensation for non-pecuniary damage depends on the degree of fault of the offender and other pertinent circumstances. The court must also take into account the degree of physical or mental suffering experienced by the victim (Article 151 § 2). The degree of physical or mental suffering is assessed on the basis of the circumstances of the case and the personality of the victim. The amount of compensation must be reasonable and equitable (Article 1101).

D. Civil procedure

28. The circumstances established by a final judgment are binding on the courts. There is no need to establish those circumstances anew and they may not be contested in any future litigation by the same parties (Article 61 § 2 of the Code of Civil Procedure).

29. The court must decide on the claims made by the plaintiff. It may only decide on claims it has raised of its own motion where a federal law so provides (Article 196 § 3).

THE LAW

I. ADMISSIBILITY OF THE APPLICATION

30. The Government submitted that the application should be rejected for failure to comply with the six-month rule. Although the final judgment in respect of all the complaints had been given on 11 June 2003, the Court had not received the application form until 19 January 2004.

31. The applicant submitted that she had dispatched the application form on 11 December 2003, that is, within six months of the final judgment.

32. The Court observes that, in accordance with Rule 47 § 5 of the Rules of Court, the date of introduction of the application is as a general rule considered to be the date of the first communication from the applicant setting out, even summarily, the object of the application. The date of introduction is accordingly the date on which the first letter was written by the applicant or, where there is an undue delay between this date and the date on which the letter was posted, the Court may decide that the postage date shall be considered to be the date of introduction (see *Gaspari v. Slovenia*, no. 21055/03, § 35, 21 July 2009; *Calleja v. Malta* (dec.), no. 75274/01, 18 March 2004; and *Arslan v. Turkey* (dec.), no. 36747/02, ECHR 2002-X (extracts)).

33. The final judgment in the present case was given on 11 June 2003. The applicant drafted her application form on 11 December 2003, as indicated on its last page, and posted it on the same date. The Court therefore accepts 11 December 2003 as the date of introduction of the application. It notes that the application was introduced within six months of the final judgment.

34. For the above reasons, the Court dismisses the Government's objection. It further observes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It is not inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

35. The applicant complained of a violation of her right to freedom of expression guaranteed by Article 10 of the Convention, which reads as follows:

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

A. The parties’ submissions

36. The applicant submitted that the interference with her freedom of expression had been unjustified. Firstly, the domestic courts had incorrectly referred to the judgment of 4 June 2002. That judgment had concerned an electoral dispute case in which the applicant had not been a defendant. The issues relating to defamation or compensation for non-pecuniary damage had not been examined in the judgment of 4 June 2002 and the applicant had not been called upon to prove the truthfulness of the allegations contained in the leaflet. Therefore the statement contained in the reasoning part of that judgment – that the applicant had failed to prove the truthfulness of the leaflet – had been superfluous. When examining the defamation dispute, the courts had incorrectly considered themselves bound by the judgment of 4 June 2002. They should have examined afresh whether the allegations in the leaflet had been proved.

37. Secondly, the applicant argued that she had proved the truthfulness of the factual allegations. Fourteen witnesses had testified before the court and had confirmed the veracity of the information contained in the leaflet. The remaining statements were value judgments expressing the employees’ personal opinion about Mr K. The domestic courts had made no distinction between value judgments and statements of fact. They had not made any analysis of whether the contested statements could have been value judgments not susceptible of proof. The defendants had thereby been denied their right to hold an opinion and to express it in the form of a value judgment.

38. Finally, the applicant claimed that the required procedural guarantees had not been afforded to her. In particular, Mr K.’s statement of claim had been limited to contesting certain allegations contained in the leaflet. However, the appeal court had, of its own motion, examined the entire leaflet and had found all the statements contained therein to be untrue. Moreover, although Mr K. had not lodged an appeal against the District Court’s judgment, the appeal court had, of its own motion, increased the award in respect of non-pecuniary damage. In the applicant’s opinion, those facts showed that the defamation proceedings had been unfair.

39. The Government submitted that the statements published by the applicant had been statements of fact. The applicant had failed to prove the truthfulness of those statements. The interference with her freedom of

expression had therefore been justified. They further disagreed with the applicant's argument that the appeal court had declared the entire leaflet to be untrue. It had only established that "the allegations contained in the leaflet" had been untrue and had amended the operative part of the judgment accordingly. The appeal court had refined the findings made by the District Court without examining any new evidence or changing the reasoning or the substance of the District Court's judgment. With regard to compensation for non-pecuniary damage, the amount had been determined in accordance with Articles 151 and 1101 of the Civil Code (see paragraph 27 above).

B. The Court's assessment

40. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society" (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, and *Jersild v. Denmark*, 23 September 1994, § 37, Series A no. 298).

41. The Court further observes that free elections and freedom of expression together form the bedrock of any democratic system. The two rights are inter-related and operate to reinforce each other, as freedom of expression is one of the "conditions" necessary to "ensure the free expression of the opinion of the people in the choice of the legislature". For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely. This principle applies equally to national and local elections (see *Kwiecień v. Poland*, no. 51744/99, § 48, ECHR 2007-I, and *Bowman v. the United Kingdom*, 19 February 1998, § 42, *Reports of Judgments and Decisions* 1998-I).

42. 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 within the meaning of Article 10 § 1 of the Convention. Indeed, although the applicant was not the author of the contested leaflet, she participated in its dissemination by publishing and distributing it. The Court reiterates in this respect that publishers, irrespective of whether they associate themselves with the content of their publications, play a full part in the exercise of freedom of expression by providing authors with a medium (see *Editions Plon v. France*, no. 58148/00, § 22, ECHR 2004-IV, with further references). It follows that the pecuniary award that the applicant was ordered to pay to Mr K. in connection with the publication of the impugned leaflet constituted an

interference with her right to impart information and ideas included in the right to freedom of expression guaranteed by Article 10 § 1 of the Convention

43. It is not contested that the interference was “prescribed by law”, namely Article 152 of the Civil Code, and pursued a legitimate aim, that of protecting the reputation or rights of others, for the purposes of Article 10 § 2. The dispute in the case relates to whether the interference was “necessary in a democratic society”.

44. The test of necessity requires the Court to determine whether the interference corresponded to a “pressing social need”, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient. In assessing whether such a need exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not however unlimited, but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10. 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. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *Karman v. Russia*, no. 29372/02, § 32, 14 December 2006, and *Grinberg v. Russia*, no. 23472/03, §§ 26-27, 21 July 2005, with further references).

45. Turning to the facts of the present case, the Court notes that the applicant, during the period directly preceding a local election in which she was a candidate, published a leaflet calling upon the local population not to vote for her competitor, Mr K. The leaflet criticised Mr K.’s moral character and its aim was apparently to cast doubt on his suitability as a candidate for the local legislative assembly. The Court reiterates that, as a general rule, any opinions and information pertinent to elections which are disseminated during the electoral campaign should be considered as forming part of a debate on questions of public interest (see *Filatenko v. Russia*, no. 73219/01, § 40, 6 December 2007, and also the case-law cited in paragraph 41 above). According to its constant case-law, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest and very strong reasons are required for justifying such restrictions (see *Krasulya v. Russia*, no. 12365/03, § 38, 22 February 2007, with further references).

46. The Court also finds it significant that the criticism contained in the leaflet published by the applicant was directed against a person engaged in

political activities, in respect of whom the limits of acceptable criticism are wider than in the case of a private individual (see *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103). By standing in the local elections, Mr K. entered the political scene and inevitably and knowingly laid himself open to close scrutiny of his every word and deed by both journalists and the public at large. Therefore, he was required to display a greater degree of tolerance.

47. Further, the Court notes that the leaflet was written and signed by a group of minority shareholders and former employees of the Oktyabrskiy department store owned by Mr K. It contained the signatories' subjective appraisal of Mr K.'s activities and moral qualities and their own perception of his influence – in their view negative – on the state of affairs in the Oktyabrskiy department store. It was clearly the subjective opinion of the signatories of the leaflet that Mr K. was unsuitable for election to the regional legislative assembly because he had, in their view, abused his influential position within the Oktyabrskiy department store and had treated the minority shareholders and employees of that store unfairly. That opinion was based on their own experience of dealing with Mr K. Their allegations that after the issue of additional shares at the initiative of Mr K. the stock had been depreciated, that Mr K. had offered to buy the shares of the minority shareholders at a low price, that several employees discontented with Mr K.'s policies and attitudes had been dismissed, and other similar allegations, found confirmation in the domestic proceedings. Accordingly, the signatories of the leaflet cannot be accused of having distorted the facts or made any allegations which did not repose on a sufficient factual basis. The Court sees no reason to doubt that they acted in good faith. It therefore considers that by publishing the leaflet the applicant was assisting in disseminating an opinion on a matter of public concern which had a sufficient factual basis.

48. Admittedly, the expression or publication of an opinion may also be excessive, in particular if its sole purpose is to insult. A clear distinction must therefore be made between criticism and insult (see, *mutatis mutandis*, *Skalka v. Poland*, no. 43425/98, § 34, 27 May 2003). It is however necessary to bear in mind that political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society (see *Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 34, ECHR 2000-X). The Court accepts that certain expressions used in the leaflet could be considered to be polemical. They do not, however, amount to insult or constitute a gratuitous personal attack because the authors supported them with an objective explanation. Although the comments contained in the leaflet were without doubt severely critical, they nevertheless appear proportionate to the frustration and indignation caused by Mr K.'s behaviour towards the signatories as perceived by them.

49. As regards the reasons cited by the domestic courts to justify the interference with the applicant's right to impart information and ideas, the Court notes firstly that the Russian courts failed to recognise that the present case involved a conflict between the right to freedom of expression and the protection of reputation and so did not carry out the relevant balancing exercise. They confined their analysis to a discussion of the damage to Mr K.'s reputation without giving any consideration to the factors discussed in paragraphs 45 to 48 above, such as the plaintiff's position as a professional politician involved in elections and the fact that the contested statements represented a subjective opinion of a group of people on a matter of public interest for the local community, based on their personal experience and reposing on an adequate factual basis. Accordingly, the Russian courts did not apply standards which were in conformity with the principles embodied in Article 10 (see, for similar reasoning, *Dyundin v. Russia*, no. 37406/03, § 33, 14 October 2008, and *Kwiecień*, cited above, § 52).

50. The Court also observes that the Russian law on defamation, as it stood at the material time, made no distinction between value judgments and statements of fact, as it referred uniformly to "statements" ("сведения") and proceeded from the assumption that any such statement was amenable to proof in civil proceedings. Irrespective of the actual contents of the "statements", the person who disseminated them had to satisfy the courts as to their truthfulness (see paragraphs 24 and 25 above, see also *Grinberg v. Russia*, no. 23472/03, § 29, 21 July 2005). Having regard to these legislative provisions, the domestic courts did not make any analysis of whether the statements published by the applicant could have been a value judgment.

51. However, it has been the Court's constant view that a distinction has to be drawn between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see *Lingens*, cited above, § 46, and *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 63, Series A no. 204).

52. The Court notes that many statements contained in the leaflet, such as, for example, that Mr K. was a "voracious big wheel" and a "terrible man", that his fortune was "made from the woes and tears of simple people", and that "whatever he undertakes is damned" were examples of value judgments which the domestic courts failed to distinguish from statements of fact. The domestic courts held that the applicant had to prove the truth of those allegations. The burden of proof was obviously impossible to satisfy.

53. Finally, the Court reiterates that the procedural guarantees afforded to the defendants in defamation proceedings are among the factors to be taken into account in assessing the proportionality of the interference under Article 10. In particular, it is important that the defendant is afforded a realistic chance to prove that the factual basis for his allegations was true. A lack of procedural fairness and equality may give rise to a breach of Article 10 (see *Steel and Morris v. the United Kingdom*, no. 68416/01, § 95, ECHR 2005-II, *Kwiecień*, cited above, §§ 46 and 55; *Castells v. Spain*, 23 April 1992, § 48, Series A no. 236; *Karman v. Russia*, no. 29372/02, § 42, 14 December 2006; and *Jerusalem v. Austria*, no. 26958/95, § 45, ECHR 2001-II).

54. In the present case Mr K. sued the applicant in respect of certain statements only. The applicant's defence was therefore limited to the extracts mentioned by Mr K. in his statement of claim. The judgment of the first-instance court was also clearly confined to analysing the extracts contested by Mr K. The appeal court, however, chose to examine the entire leaflet and to declare that its contents were untrue. The Court is not convinced by the Government's assertion that the appeal court did not go beyond Mr K.'s claim. It notes that in its judgment the appeal court referred to statements which had not been mentioned in Mr K.'s statement of claim, such as, for example, "the story of K[.]'s dark fortune" and "his fortune was made from our tears", and found that they had damaged Mr K.'s honour, dignity and professional reputation. The appeal court, moreover, stated explicitly that "the entire leaflet contain[ed] untrue statements" and decided to increase the award accordingly (see paragraph 21 above). Given that under domestic law the courts might go beyond the scope of the plaintiff's claim only in cases specified in federal laws (see paragraph 29 above) and that the appeal court did not refer to any federal law that would give it power to do so in the present case, the Court considers that the decision of the appeal court to declare the entire leaflet untrue could hardly be foreseeable to the applicant. It is also relevant that the appeal court's judgment was final, there being no further ordinary instance before which the applicant could have advanced his defence against its findings. It follows that in respect of the statements which had not been mentioned in Mr K.'s statement of claim, the applicant was afforded no opportunity at any stage of the proceedings to prove that they were true or had a sufficient factual basis.

55. The Court also observes that the domestic courts considered themselves bound by the findings made by the Regional Court in the electoral dispute between Mr K. and the electoral commission, with the applicant involved as a third party. In particular, the domestic courts referred to the finding contained in the judgment of 4 June 2002 that the applicant had not proved the truthfulness of the extracts contested by Mr K. (see paragraphs 16 and 21 above). However, the Court takes note of the

applicant's argument, not contested by the Government, that during the electoral dispute she had not been called upon to prove the truth of the allegations contained in the leaflet. Indeed, that dispute concerned the allegedly unlawful electoral agitation and, under domestic law, its scope was limited to determining whether the leaflet contained statements encouraging social, racial, ethnic or religious hatred or enmity, calling for the usurpation of power or forcible change of the constitutional foundations of the Russian Federation, or advocating war (see paragraph 23 above). The Regional Court stated specifically that all the issues relating to defamation had to be examined in separate proceedings (see paragraph 12 above). The Court is therefore persuaded that during the examination of the electoral dispute the applicant was not given a meaningful opportunity to prove the truth of the allegations published by her. It finds it peculiar that during the subsequent defamation proceedings the domestic courts found that the applicant was barred from arguing that her allegations had been true because she had failed to do so during the electoral proceedings. Owing to that finding, the applicant was deprived of any chance to show that the allegations contained in the leaflet had a sufficient factual basis.

56. The court concludes from the above that the applicant's procedural rights were curtailed to an extent incompatible with Article 10. The lack of procedural fairness and equality therefore gave rise to a breach of that Article in the present case.

57. In the light of the above considerations, the Court finds that the leaflet published by the applicant rested on a sufficient factual basis and did not exceed the acceptable limits of criticism. That the proceedings were civil rather than criminal in nature and the final award relatively small does not detract from the fact that the standards applied by the Russian courts were not compatible with the principles embodied in Article 10 since they omitted to perform a balancing exercise between the need to protect the plaintiff's reputation and the applicant's right to divulge information on issues of general interest, refused to distinguish between value judgments and statements of fact, and failed to afford procedural guarantees to the applicant to ensure that she had a realistic opportunity to prove that the allegations published by her had a sufficient factual basis. The Court therefore considers that the Russian courts did not adduce "sufficient" reasons justifying the interference at issue and that they overstepped the narrow margin of appreciation afforded to them for placing restrictions on debates of public interest. Accordingly, the interference with the applicant's right to freedom of expression was disproportionate to the aim pursued and not "necessary in a democratic society".

58. There has therefore been a violation of Article 10 of the Convention.

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

59. The applicant complained under Article 6 § 1 and Article 13 of the Convention that the appeal court had gone beyond the plaintiff's claim by declaring that the entire leaflet was untrue and by increasing the award accordingly. This complaint falls to be examined under Article 6 § 1 the relevant part of which reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

60. The Court finds that this complaint relates to issues which have already been examined in the context of Article 10 (see paragraphs 53 to 56 above). For this reason the Court finds that the complaint should be declared admissible but that it is unnecessary to consider it separately (see, among other authorities, *Kwiecień*, cited above, § 62, and *Jerusalem*, cited above, § 51).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. 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

62. The applicant claimed compensation in respect of pecuniary and non-pecuniary damage sustained by her and the three signatories of the leaflet. In particular, she claimed 11,000 Russian roubles (RUB), representing the amount paid by them to the plaintiff in the defamation action. She also argued that that amount should be adjusted for inflation. She left the determination of the amount of compensation for non-pecuniary damage to the Court's discretion.

63. The Government accepted the claim in respect of pecuniary damage in the amount of RUB 5,000, the amount paid by the applicant to the plaintiff in the defamation proceedings. They argued however that the claims submitted by the applicant on behalf of the three signatories of the leaflet should be rejected as irrelevant to the present case. As regards the claim in respect of non-pecuniary damage, the Government submitted that a finding of a violation would constitute sufficient just satisfaction.

64. The Court firstly notes that the three signatories of the leaflet were not a party to the proceedings before it. They therefore have no standing to claim compensation. The Court rejects this part of the claim.

65. The Court considers that the sum which the applicant had to pay to the plaintiff in the defamation action may be taken into account (compare *Thoma v. Luxembourg*, no. 38432/97, § 71, ECHR 2001-III). The applicant's claim for an inflation-related adjustment must however be rejected, as she failed to substantiate it by any documents showing the inflation rate during the relevant period. Accordingly, the Court awards EUR 128 to the applicant in respect of pecuniary damage, plus any tax that may be chargeable.

66. Finally, the Court considers that the applicant has suffered non-pecuniary damage as a result of the domestic courts' judgments, which were incompatible with Convention principles. The damage cannot be sufficiently compensated by a finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant 9,000 euros (EUR), plus any tax that may be chargeable on that amount.

B. Costs and expenses

67. The applicant also claimed RUR 7,000 for translation expenses. She submitted the relevant receipts.

68. The Government disputed the claim.

69. 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 considers it reasonable to award the sum of EUR 180 for translation expenses, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 6 § 1 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:
 - (i) EUR 128 (one hundred and twenty-eight euros), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (ii) EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (iii) EUR 180 (one hundred and eighty 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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Christos Rozakis
President