



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

FIRST SECTION

CASE OF SALIYEV v. RUSSIA

(Application no. 35016/03)

JUDGMENT

STRASBOURG

21 October 2010

FINAL

21/01/2011

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

In the case of Saliyev v. Russia,

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

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyeu,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 30 September 2010,

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

PROCEDURE

1. The case originated in an application (no. 35016/03) 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, Mr Kakhraman Umarovich Saliyev (“the applicant”), on 20 October 2003.

2. The applicant was represented by Mr S. Maksimiyuk, a lawyer practising in Magadan. The Russian Government (“the Government”) were represented by Mr P. Laptev and Ms V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that the withdrawal of part of a print run of the newspaper *Vecheniy Magadan* containing an article written by him had violated his rights under Article 10 of the Convention (freedom of expression).

4. By a decision of 27 September 2007, the Court declared the application admissible.

5. The Government, but not the applicant, filed further written observations (Rule 59 § 1). In addition, third-party comments were received from Mr Svistunov, who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The respondent Government replied to those comments (Rule 44 § 5).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1957 and lives in Magadan.

A. Withdrawal of the newspaper

7. The applicant was the president of a non-governmental organisation known as *Investory Kolymy* (Investors of Kolyma). In 2001 he wrote an article entitled “Shares for the Moor of Moscow” (“Акции для московского мёра”). The article was about the acquisition of shares in Kolymaenergo Plc (a local energy-producing company which was at the time a part of the State holding *Edinye Energeticheskiye Systemy Rossii*) by a group of Moscow-based firms. In the article the applicant described the purchase as a crooked deal and alleged that a high-level official from Moscow, one of the leaders of the pro-government political party, was behind the transaction. The article reads as follows:

“Shares for the Moor of Moscow

Where are the 1,300,000,000 roubles [obtained from] the placement of shares in Kolymaenergo Plc?

We meant well ...

Everything started with an advertisement in [the official daily] *Rossiyskaya Gazeta* of 1 July 2000, in which Kolymaenergo Plc informed us about the next step in its exploration of market in the country – namely, about the official registration of the issue of 3,231,000,000 simple non-documentary nominal shares. [In that advertisement *Kolymaenergo*] described in great detail the conditions and procedure for the issue of the shares, including the distribution of the shares amongst prospective buyers in the first priority group and the second priority group, explained how to formulate a request for acquisition of shares, and, naturally, indicated the bank account into which payments for the shares should be made. The payments were supposed to go through a commercial bank situated in Krasnodar [a city in southern Russia]. In other words, a reputable firm got involved, and, as a consequence, the business was put on a solid footing. At least, that was the appearance that the sponsors of the project wanted to create for those who they hoped would “swallow the bait” and, under the influence of the very promising advert – published, by the way, in all the mass media of the Magadan Region – would be prepared to play for high stakes.

At the local level the preparations had started long before the publication of the advert. First of all, the issuer (the corporation issuing the securities) took care to develop convincing arguments which would help to get support for their project from public officials. On 29 April 1999 a consultation meeting took place in the office of the head of the Yagodninskiy District [of Magadan Region], where the question of payment of the local taxes due by Kolymaenergo Plc was discussed. It was no

accident that that question was on the agenda of the meeting: by that time the outstanding fiscal debt of the energy industry [*vis-a-vis* the local authorities], including the carryovers from previous years, amounted to 228,700,000 roubles – a very significant amount for the District [budget]. As a result of the discussion an agreement was reached which provided, in particular, that (direct quote) “the administration of the Yagodninskiy District discharges Kolymaenergo Plc from the payment of 228,700,000 roubles in local taxes. In return, Kolymaenergo Plc transfers [to the administration] its shares worth 228,700,000 roubles, at the market rate applicable at the moment of the transfer”. Both parties signed the minutes of the meeting containing that clause. Naturally, among the signatures were those of Mr F.I.T., the head of the local administration, and Mr G.I.S., the managing director of Kolymaenergo. Some time later Mr. G.I.S. made a similar proposal – “shares in exchange for taxes” – to the financial department of the administration of the Magadan Region and to the mayor's office of Magadan.

The plot thickens. At the beginning of November 1999 the Duma of the Magadan Region adopted the Law on investment in the construction of the Ust-Srednekanskaya HydroElectric Power Plant (HEPP). Almost certainly, everyone has heard about the problems with the financing of that “never-ending construction project”, so the desire of the lawmakers to use every opportunity to get the extra funding is quite understandable. As a result, in the new law, driven by the best aspirations, they stipulated that “... in order to complete the construction of the Ust-Srednekanskaya HEPP plant, which is one of the most important elements in the fuel and energy system of the Magadan Region ... Kolymaenergo Plc may dispose of the fees as a registered member of the special economic zone, due for the period until 31 December 2002, which were earmarked for the special-purpose extra-budgetary fund for social development in the Magadan Region.

Those fees should be considered as a capital investment in the main capital of Kolymaenergo Plc, in particular to pay for the construction costs of the Ust-Srednekanskaya HEPP, on condition that a corresponding part of the shares is registered as the property of the Magadan Administration” (end of quote). That law was enacted on 3 November 1999.

... But it ended up the same as always

As the saying goes, “everything looked smooth on paper, but they forgot that in reality it was full of cracks”. The fourth additional issue of shares was registered on 16 June 2000, and distribution was supposed to start in two weeks. On different dates, all within the period of open distribution of the shares, a number of potential investors concluded standard acquisition agreements with Kolymaenergo Plc. *Edinye Energeticheskiye Systemy Rossii* [the biggest State-controlled energy company at that time], for good reason, bought shares for almost 1,680,000,000 roubles, thus investing in the construction of the Ust-Srednekanskaya HEPP. However, the situation has since changed, for the worse as regards most of the investors. One of the local companies, Regiondragmet Ltd, expressed an interest in purchasing shares for 1,200,000,000 roubles. When the director of Kolymaenergo Plc. Mr G.I.S., learned about that offer, he requested that all previous offers and the book where they were registered be destroyed, and decided that henceforth he would take care of the distribution of the shares.

Very soon, instead of the bank account in Krasnodar indicated in the original issue plan, a new bank account was opened, this time with the Korvet bank (Moscow), and,

following that, the implementation of the whole scheme, as designed from the very beginning, started. In a very short time, three commercial firms were incorporated in Moscow: Bakkar Ltd, Promstroy TEK Ltd and ONEKS-Consulting Ltd. Bakkar transferred 140,000,000 roubles to Kolymaenergo's account with the Korvet bank; with that money the recipient [Kolymaenergo] paid for the promissory notes issued by ONEKS-Consulting. For those not familiar with all the subtle details, I should explain that promissory notes, unlike shares, do not need to be secured by any property or financial resources of the company that issued them. That is why any limited company with a charter capital of eight or ten thousand roubles and nothing besides, not a bean, can issue promissory notes for one billion roubles, provided that a buyer comes forward.

In our case the buyer was Kolymaenergo, which at that time had an outstanding debt of more than a billion roubles owed to its employees, the pension fund and the State budget at different levels. The value of the promissory notes was no less than 1,300,000,000 roubles; it's no coincidence that the head of Bakkar earlier transferred 140,000,000 roubles to the account with the Korvet bank (see above). And then that amount was passed ten times through the corresponding bank accounts, with the use of the same photocopied bank payment order. As a result, Bakkar purchased, almost for free, a huge number of shares which amount to 15 per cent of the overall charter capital of Kolymaenergo.

It is easy to guess what the reaction of the would-be investors, who suffered both pecuniary and non-pecuniary damage, was. Numerous legal suits, petitions and complaints were addressed to the Magadan Town Court, the Commercial Court of the Magadan Region, *Edinye Energeticheskiye Systemy Rossii* and other senior authorities. On 14 May 2001 an NGO called *Investory Kolymy* was created by a group of persons, and it immediately joined in the process of uncovering the truth. The main goal of that NGO consisted in promoting the interests of the investors, shareholders and other interested persons, and protecting their investment in the energy industry of the Magadan Region before the courts, social policy institutions or any organisations competent to address their concerns in whatever manner. But they received silence in reply [to their petitions]. In particular, the board of directors of Kolymaenergo kept ignoring them, although it had been Mr V.A.P., the head of the board, who had approved the [share] issue plan.

As we can read in a letter from one of the shareholders of Kolymaenergo to the head of the management board of Kolymaenergo, Mr A.S. (with a copy to the head of the management board of *Edinye Energeticheskiye Systemy Rossii*, Mr A.B.Ch.): "In the internal audit report, under the heading of "Profits and losses" there is no information about any money received from the shares sold. 1,300,000,000 roubles were supposed to be transferred to the bank account of Kolymaenergo Plc. That money was sufficient to pay the outstanding debts of the company, to relaunch normal operations through the bank account of the company and not through [non-monetary] "clearances" in which the company was losing half of what was due to it.

"Furthermore, it became known that some of the shareholders, namely Bakkar and Promstroy TEK, had paid only one tenth of the price [of the shares they had purchased], whereas according to the audit report on the issue of the shares Bakkar had paid [Kolymaenergo] the full price. Why has this been done?" [end of quote]

The arguments of the claimant were considered unpersuasive

That letter was sent as early as May 2001; in June a meeting of shareholders took place, but the author of the letter did not get a reply until now. The question formulated at the end of the quote is, most likely, a rhetorical one, because we are all grown-ups and we all understand why it has been done. We also understand that after that scam with the shares came to an end, all our hopes inspired by the promises of the sponsors of the [share issue] plan, the hope of getting salary arrears paid, of getting tax paid, of investing in the construction of the Ust-Srednekanskaya HEPP, etc., all those hopes have vanished.

A striking example is provided by the situation with the company Metalloekspornaya, which brought proceedings before the Commercial Court of the Magadan Region, seeking damages from Kolymaenergo Plc for false advertising. That company [Metalloekspornaya] was prepared to buy 400,000 shares. Last year, on 25 December, it made the first payment, but on the next day the money was returned [to Metalloekspornaya] since the account indicated in the agreement did not exist and the recipient of the money was not [amongst the clients of the bank] (now we know why – the account with the Krasnodar bank was never opened). The Metalloekspornaya company immediately sent Kolymaenergo all signed documents and asked them to provide new banking details for the bank transfer. However, there was no reply. A new request in similar terms was made on 2 February 2001, but, again, to no avail. As a result, on 21 May 2001 a tort claim was introduced before the Commercial Court of the Magadan Region, for an amount of 90,000 roubles.

The claimant's arguments were very convincing. Let us take the manipulation with the bank accounts described above. Whereas most of the potential buyers of the shares of the fourth additional issue tried (in vain) to use the account indicated in the issue plan, i.e., the account that in reality did not exist, those investors for whom Kolymaenergo created a most-favoured regime were able to pay for the shares through a secret account in the Moscow-based Korvet bank. The decision of the court mentioned that fact; however, it was interpreted in a peculiar way. Indeed, as the decision established, "... owing to the absence of the bank account and of a recipient in the bank the money in the amount of 2,000 roubles was returned". To all appearances, that fact is established. However, on the same page, a few paragraphs below, one can read one of the arguments which the defendant put forward: "... in breach of the agreement on the acquisition of shares the claimant had made the payment before the conclusion of the agreement." On the next page we see the court's conclusion, which was the central reason for dismissing the tort action: "... at the moment of conclusion of the agreement the claimant had been required to transfer to the defendant no less than 200,000 roubles. The defendant, in accordance with section 3.3 of the agreement, was to forward to the claimant the documents confirming the payment together with a signed copy of the agreement. However, in breach of the agreement, the claimant only transferred 2,000 roubles for the shares".

Too many inconsistencies, are there not? In fact, contrary to what the court established, the payment had been made on 25 December, i.e., after the conclusion of the agreement, which had been signed on 9 December. What does this mean? First of all, it means that the materials in the case file were not duly studied by the court. Furthermore, what difference would it make if the claimant transferred 200,000 roubles and not 2,000? Would the correct bank account appear in the issue plan? Would it allow the company to become the lawful owner of the shares? Unfortunately, miracles are impossible, especially when nobody wants to produce a miracle. And

please pay attention to the phrases which are underlined [in the quote above]. It is hard to reconcile the argument of the defendant (that the payment should have been made after conclusion of the agreement) and the argument of the court (that the buyer was under an obligation to send a signed copy of the agreement together with a document confirming payment). I will further note that the acquisition agreement required [the buyer] to pay 50 per cent of the overall sum of the transaction, but did not specify whether such payment had to be made in instalments or in one go.

And that is not the end. In the section “Distribution of the shares amongst buyers in the second priority group” of the issue plan one can read: “Offers from prospective buyers in the second priority group will be accepted [by Kolymaenergo Plc] in chronological order of their receipt”. That means that the dates of receipt of every offer should be registered in a special logbook. However, the requests by the claimant and by the court to produce such a logbook were to no avail. It was only possible to see the record of existing shareholders, in which, under no. 1, we can see the name of the very same Moscow-based firm which obtained, for unclear reasons, preference in buying the shares. Still, it was impossible to get a clear answer to the question whether an offer from Metalloeksportnaya to buy shares was registered, and, if so, on what date.

Ready or not, here I (don't) come?

Very shortly [I will tell] you about those who stood to gain in this whole obscure story. When the prosecution officials involved in the inquiry into the situation with the shares came to Moscow, they were unable to find Bakkar Ltd, Promstroy TEK Ltd or ONEKS-Consulting at the official addresses given, or those people who were mentioned in the documents of Kolymaenergo Plc. The Moor has done his work, and the Moor has left, without leaving an address or even saying “Goodbye”.

This is the true situation; however, criminal investigation no. 14158 into the abuse of official position by the managers of Kolymaenergo Plc was finally closed for lack of the constitutive elements of a crime.

The decision of the Commercial Court of the Magadan Region was appealed against by the NGO *Investory Kolymy*; in its grounds of appeal all the breaches of the law in the sphere of the advertisement, selling and buying of shares were described in detail. However, the Court of Appeal again just ignored the arguments of the claimant. None of the facts mentioned above, which clearly spoke against the defendant, were taken into account. As a result, the claimant, together with *Investory Kolymy*, lodged an appeal on points of law with the Court of Cassation in Khabarovsk. As to the discontinuation of the criminal investigation, we will challenge the decision of the prosecution in this respect by all legitimate and civilised means.

When that dispute started, we informed Mr A.B.Ch., the head of the management board of *Edinye Energeticheskiye Systemy Rossii*, and the Federal Commission on Securities, of the situation. However, a principle of *esprit de corps* came into play, and they decided not to wash their own dirty linen in public. As it appears, they want to cover up the affair at all levels.

If we do not succeed, we will still continue fighting. On 15 August 2001 our organisation sent to the Magadan Town Court a statement of claim against Kolymaenergo and the Federal Commission of Securities and the then head of the Board of Directors of Kolymaenergo, the leader of the “United Russia” fraction in the

State Duma, Mr P., the General Director of Kolymaenergo Mr. S., and the chief accountant Ms K. What is our organisation asking for before the court? First of all, that it declare the advertisement of the fourth issue of shares abusive, and the issue itself invalid. We think that Kolymaenergo Plc breached the provisions of the federal legislation, in particular, the Standards for the Issue of Shares, the Act on Defence of the Rights of Investors and the Public Limited Companies Act. The legal provisions on which we base our claims are indicated in the statement of claim.

So far the date of the hearing in this case has not been set; it will take place in October or November, after the judge returns from her leave. By the way, the judge took annual leave twenty days after the case had been assigned to her. A similar handling of cases concerning machinations with shares has become almost systemic.

All this squabbling cannot but be detrimental to the investment climate in the region, because Kolymaenergo is a public limited company and its shares can be purchased by foreign investors as well. And now, when Russia is seeking recognition as a country with a market economy, events of this kind will not help it to acquire weight.

In the current situation the NGO *Investory Kolymy* will insist on an objective examination of its civil claims and of the criminal case, in order to protect the rights of investors.

A. Saliyev,

Head of the Advisory Board of the NGO *Investory Kolymy*”

8. On 10 October 2001 the applicant submitted the article to a municipally owned newspaper, *Vecherniy Magadan*, for publication. He produced documents in support of the facts described in the article. Mr Svistunov, the editor-in-chief of the newspaper, agreed to publish the article. It was included in issue no. 44 of 2 November 2001. That issue, with the applicant's article in it, had a print run of 5,184 copies.

9. On the morning of 2 November 2001, 2,394 copies of the issue containing the applicant's article were sent to subscribers and to State libraries. Two thousand copies were given to the distributing company Rospechat to be sold at street distribution points, kiosks and newsstands. However, shortly afterwards those copies were withdrawn from the newsstands and they were later destroyed. According to the Government, the withdrawal was requested by Mr Svistunov (the editor-in-chief). They submitted a letter from the editor-in-chief to the head of Rospechat asking the latter to withdraw the copies. The letter is dated 2 November 2001; however, according to the applicant it was backdated. Only the copies that had been sent to libraries and subscribers remained. The Government submitted that a part of the print run had already been sold, with the result that only 120 copies had been withdrawn and destroyed.

10. On 5 November 2001 the editor-in-chief wrote a letter to the mayor of Magadan asking the latter to release him from the position of editor-in-chief because he “was unable to perform his duties in a fully professional manner”.

11. On 10 November 2001 the head of the trade union at the Kolymaenergo hydroelectric power plant wrote a letter to the editor-in-chief of *Vecherniy Magadan* asking him to explain why issue no. 44 had been withdrawn from the newsstands.

12. On 11 November 2001 the editor-in-chief replied to that letter explaining that he had not given the relevant order. He claimed that the decision had been taken by the head of the distributing company Rospechat. He, the editor-in-chief, had had to sign a backdated order for withdrawal of the copies, and from a private conversation he had understood that the copies had been withdrawn because of the applicant's article, which had mentioned the names of certain politicians whom the editor-in-chief described as "untouchable". After that incident he "[had taken] the difficult decision to resign from the position of editor-in-chief of *Vecherniy Magadan*", because, in his words, "the newspaper was unable to enjoy freedom of speech and of the press," and he "did not want to deceive readers". It appears that soon afterwards the editor-in-chief left *Vecherniy Magadan* and started working as a journalist on a private newspaper.

13. In the following months the applicant tried to publish the article in several regional and central newspapers, but to no avail.

B. Criminal investigation

14. On an unspecified date in 2002 the applicant lodged a formal complaint with the regional prosecutor's office concerning the withdrawal of the copies. In his submission, the withdrawal amounted to unlawful interference with freedom of the press, a criminal offence under Article 144 of the Criminal Code.

15. On 22 January 2003 that complaint was transmitted to the Magadan town prosecutor's office. The case was assigned to an investigator, who questioned the head of Rospechat and the former editor-in-chief.

16. On 30 January 2003 the head of Rospechat testified before the investigator that the decision to withdraw the copies had been taken by the former editor-in-chief. On the following day the investigator questioned Mr Svistunov, the former editor-in-chief of the newspaper. Mr Svistunov confirmed that he had asked Rospechat to withdraw the copies of the newspaper. He explained that he had agreed to publish the article because it concerned an interesting subject and because the applicant had shown him documents which supported the facts described in the article. The editor-in-chief had thought that the article would arouse public interest and had decided to publish it. However, after fresh consideration, when the newspaper had already been printed and sent out for distribution, he had decided to withdraw it. He had realised that the editorial staff "would have problems" if the article was published. As to his letter of 11 November

2001, it had not been accurate, because at the time he had been upset over his own decision to resign from the post.

17. On 31 January 2003, after a preliminary inquiry, the investigator decided not to open a criminal investigation. The investigator found that the decision to withdraw the copies had been taken by the editor-in-chief himself without any coercion. The investigator noted, however, that the decision of the editor-in-chief to withdraw the copies had been motivated by the need to avoid lawsuits and litigation which might have followed the publication of the article, and to protect the editorial staff. The investigator concluded that no interference with freedom of the press had occurred.

18. The applicant challenged that decision before the court. On 7 April 2003 the Magadan Town Court examined the materials in the case file and heard evidence from the applicant and the former editor-in-chief; the latter testified that he had signed the order to withdraw the copies after they had already been withdrawn from sale. After examining the applicant's complaint, the Town Court decided to quash the decision of 31 January 2003. The court noted that by law the withdrawal of a print run could be ordered only by the judicial authorities. The Town Court also ordered certain additional investigative measures to be carried out by the investigating authorities.

19. On 23 April 2003 the Magadan town prosecutor ordered an additional inquiry. The case was assigned to another investigator, who questioned the applicant, the former editor-in-chief, the head of Rospechat and a staff member of Rospechat. The applicant testified that when he had learned about the withdrawal of the copies he had called the editor-in-chief, who explained that they had been withdrawn by a decision of Rospechat, and that the head of Rospechat had persuaded him to sign a backdated order for withdrawal.

20. The head of Rospechat testified that the copies had been withdrawn by order of the then editor-in-chief. He also denied putting any pressure on the editor-in-chief.

21. The former editor-in-chief confirmed his previous testimony given to the investigator of the town prosecutor's office. As to his testimony before the Town Court, it was his view that the copies had been withdrawn before the order had been signed. Indeed, he had discovered at one of the street kiosks that all copies of issue no. 44 had disappeared. However, he had no proof that they had disappeared because they had been withdrawn.

22. Finally, the staff member of Rospechat confirmed that on an unspecified date she had helped the then editor-in-chief of *Vecherniy Magadan* to withdraw the copies from the street kiosks. Altogether, they had managed to withdraw between 100 and 200 copies.

23. On 3 May 2003 the investigator concluded that there was no case to investigate. His reasoning was similar to the reasoning of the previous investigator of 31 January 2003.

24. The applicant challenged that decision before the courts. On 20 May 2003 the Magadan Town Court upheld the decision of 3 May 2003. The court concluded that the prosecution inquiry had been carried out with due diligence and that the findings of the inquiry had been properly reasoned. The applicant appealed, but on 25 June 2003 the Magadan Regional Court upheld the judgment of 20 May 2003.

C. Civil proceedings

25. The applicant brought court proceedings seeking to have 2,000 copies of issue no. 44 containing his article reprinted and sold at street kiosks.

26. On 1 July 2003 the Magadan Town Court dismissed his action. The court stated that the newspaper, as the owner of the copies, could dispose of them of its own free will. The court also found that there had been no contract between the applicant and the newspaper obliging the latter to distribute the issue containing the article.

27. The applicant appealed. On 5 August 2003 the Magadan Regional Court upheld the lower court's decision, repeating the latter's reasoning.

D. Status of *Vecherniy Magadan*

28. According to the charter of the newspaper, *Vecherniy Magadan* was founded by the municipal property committee of the municipality of Magadan ("the municipality") in the form of a "municipal institution" (*муниципальное учреждение*), with a view to informing the population of Magadan about social, political and cultural life in the town. The municipality retains the ownership rights in respect of the assets of the newspaper, while the newspaper exercises a right of "operational management" (*право оперативного управления*) in respect of those assets. The municipality approves the budget of the newspaper and payroll expenses. The newspaper receives its funding from the municipal budget; it can also receive income from other sources such as advertising, subscription fees, and so on. In 2007, according to the Government, all the newspaper's expenses (6,980,000 roubles) had been paid from the municipal budget.

29. The municipality can "define targets" for the development of the newspaper. The newspaper has an "editorial council" (*редакционный совет*), a "coordinating and advisory body" composed of the editor-in-chief and several representatives of the municipality.

30. The editorial policy of the newspaper is defined by the "editorial board" (*редакционная коллегия*), composed of the editor-in-chief, his deputy, the secretary, and the heads of departments. The editorial board can propose materials for publication or recommend not publishing "controversial material".

31. The editor-in-chief of the newspaper is appointed by the municipality. The editor-in-chief appoints the other staff members of the newspaper and acts on behalf of the newspaper *vis-à-vis* third parties. The municipality cannot compel the newspaper to publish material if it has been rejected by the editorial board, unless the law provides otherwise or the material is of an official nature. The charter of the newspaper does not stipulate, however, who can decide to withdraw or destroy copies of the newspaper or the grounds for doing so.

II. RELEVANT DOMESTIC LAW

32. The Media Act of 27 December 1991, with further amendments, prohibits censorship: State bodies and officials cannot require a communication medium (for instance a newspaper) to obtain prior authorisation for the publication of material. The Act also prohibits banning the distribution of certain material (section 3 of the Act).

33. Under section 2(10) of the Act the editor-in-chief heads the editorial board and “takes final decisions as to the production and distribution of the medium”.

34. A communication medium may be established by a State body. The owner (founder) of the medium may interfere with editorial policy only to the extent defined in the charter of that medium (sections 18 and 19 of the Act).

35. Under section 25 of the Act, non-subscription sales of a newspaper (for example, sales from newsstands on the streets) may be limited only to the extent defined by the Act.

36. Under section 28 of the Act confiscation or destruction of a print run (*мүдәх*) or part of it is possible only pursuant to a court decision [to this end] which has entered into legal force.

37. Under section 42 of the Act, unless otherwise provided by the law, nobody can compel the editorial board to publish material which has been rejected by that board.

38. Founders, editors, publishers, journalists and authors may be held liable for breaches of Russian legislation on the mass media (section 56).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

39. Under Article 10 of the Convention the applicant complained about the withdrawal of copies of the newspaper containing his article. Article 10 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 Government's submissions

40. The Government submitted that the print run belonged to the newspaper. Therefore, as an independent legal entity and a market player the newspaper had the right to dispose of its property as it deemed appropriate. The newspaper had never given any undertaking to the applicant to print or distribute a specific number of copies of issue no. 44 containing his article. Therefore, the applicant's rights had not been affected.

41. Further, the Government claimed that under the Media Act nobody could oblige a newspaper to publish an article. They referred to section 42 of that Act (cited above, in the “Relevant domestic law” part), which provided that the editorial board could refuse to publish material. Such a decision could be taken by the editor-in-chief by virtue of section 2 of the Act. As to section 28, referred to by the applicant, it concerned the case of confiscation of a print run, but not to its voluntary withdrawal by the owner.

42. The Government pointed out that *Vecherniy Magadan* was a municipal newspaper. However, the municipality of Magadan was not a part of the federal or regional system of government. Municipalities in the Russian Federation were independent entities. Their actions could not entail State responsibility under the Convention.

43. The primary purpose of *Vecherniy Magadan* was to publish official documents of the municipality and, occasionally, articles “of political, social, and cultural interest”. The exact position of the newspaper on the

local print media market was unknown. However, the municipality itself described it as not very popular: it held third place amongst the city's newspapers (with a print run of 5,184 copies), behind *Kolya Trakt* (26,500 copies) and *Magadan Pravda* (20,000 copies). It was normal for hundreds of copies of *Vecherniy Magadan* to remain unsold at the end of the distribution period.

44. The Government insisted that the copies had been withdrawn not for political reasons but because the editor-in-chief feared incurring civil liability for having published the applicant's article. According to the documents, only 120 copies had been withdrawn. Therefore, 97.7% of the print run had been distributed to the subscribers, State libraries, street sellers, and so on. The applicant's allegations as to the withdrawal of all 2,000 copies destined for street distribution was unsubstantiated and had been refuted by the findings of the domestic criminal investigation.

B. The applicant's submissions

45. The applicant did not submit any additional observations after the case had been declared admissible by the Court. His earlier observations on the merits of the case can be summarised as follows.

46. The applicant maintained that the copies had been withdrawn for political reasons. The newspaper belonged to the municipality of Magadan and was thus under the control of the public authorities. The article at issue concerned a financial deal involving an influential politician, namely the leader of the pro-government party in the lower chamber of the federal Parliament. It was unclear who had decided to withdraw the copies and when it had happened. Since it had been an act of political censorship, the recall of the copies could not be regarded as a "voluntary withdrawal" as the Government suggested. Russian law prohibited confiscation of a print run or its destruction without prior court authorisation. Therefore, the withdrawal had been unlawful.

47. Furthermore, it was true that there had been no agreement between the applicant and the editorial board as to the number of copies of issue no. 44 to be printed. However, the number of copies printed was indicated in each issue of the newspaper. That could have been regarded as a "public offer" by which the editorial board was bound.

48. Finally, a newspaper was not just a product for sale: an editor could not just withdraw a newspaper from newsstands in the same way as a manufacturer withdrew defective goods from the shops. A newspaper was an instrument for conveying information of public interest and in this capacity it was protected by Article 10. Limitations on freedom of expression were permissible only on the grounds listed in the second paragraph of Article 10. However, no such grounds had existed at the time of the withdrawal in question.

C. Third-party submissions

49. On 10 April 2008 Mr Svistunov (the former editor-in-chief of *Vecherniy Magadan*) submitted his observations on the case, which were admitted as third-party submissions.

50. Mr Svistunov claimed that about 1,000 copies of the newspaper had been withdrawn. He further argued that the withdrawal had been related to the critical article written by the applicant, which concerned high-level politicians involved in the privatisation of the Kolyma hydroelectric power plant. He regarded the withdrawal as interference with the freedom of the press; it had led to his resignation from the position of editor-in-chief of the newspaper.

51. In their comments on Mr Svistunov's observations the Government reiterated their arguments on the merits of the applicant's complaint. Hence, they insisted that only 120 copies had been withdrawn. They further reiterated that it had been Mr Svistunov's own decision to withdraw the unsold part of the print run. In addition, the article written by the applicant implied that the State officials named in it had been involved in criminal activity. Consequently, the publication of such an article could have entailed financial liability on the part of the newspaper for the publication of untrue facts. The editor-in-chief of *Vecherniy Magadan* had therefore decided to recall the copies in order to protect the newspaper from possible lawsuits, fines or even a revocation of its licence. The decision to withdraw the copies from sale had been taken by Mr Svistunov without any external pressure. His own submissions to the contrary were unreliable, since he had been dismissed from his position and was therefore biased.

D. The Court's assessment

1. *Whether there was an "interference" with the applicant's freedom of expression*

52. The Court reiterates that, as a general rule, privately owned newspapers must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals or even by their own staff reporters and journalists. The State's obligation to ensure the individual's freedom of expression does not give private citizens or organisations an unfettered right of access to the media in order to put forward opinions (see *X and the Association Z v. the United Kingdom*, no. 4515/70, Commission decision of 12 July 1971, Yearbook 14, p. 538; *Stiftelsen Contra v. Sweden*, no. 12734/87, Commission decision of 9 December 1988, unreported; and, *mutatis mutandis*, *Murphy v. Ireland*, no. 44179/98, § 61, 10 July 2003). A right of access to the privately owned press may be conceded in some circumstances (see *Winer v. the United*

Kingdom, no. 10871/84, Commission decision of 10 July 1986, Decisions and Reports (DR) 48, p. 154, and *Spencer v. the United Kingdom*, nos. 28851/95 and 28852/95, Commission decision of 16 January 1998, DR 92-A, p. 56), but such cases remain an exception.

53. The Court's approach may be different in a situation where the press is, *de jure* or *de facto*, in the hands of a monopoly, especially a Government monopoly (see the very detailed analysis of the Convention case-law in this regard in *Manole and Others v. Moldova*, no. 13936/02, §§ 95 et seq., ECHR 2009-... (extracts)). In the field of audiovisual broadcasting the Court stated that “where a State ... decide[s] to create a public broadcasting system, ... domestic law and practice must guarantee that the system provides a pluralistic service” (see *Manole and others*, cited above, § 100 and § 101).

54. Turning to the present case, the Court notes that *Vecherniy Magadan* did not hold a monopoly over the printed press in the region; it operated in a sector open to competition, both *de jure* and *de facto*. Even if a newspaper is created to provide a public service it may have its own editorial policy and must not necessarily be neutral in its views. The choice of the material that goes into a newspaper, the decisions made as to limitations on the size and content of the paper and the treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment. Therefore, if the editor-in-chief had refused to accept the applicant's article when it was submitted for publication, the Court would analyse this situation through the prism of “right of access to the press”, which enjoys only minimal, if any, protection under the Convention.

55. However, the present case is not about the applicant's “right of access to the press”. The Court considers that the situation at hand should be analysed through the prism of “interference” with the applicant's freedom of speech, for the following reasons.

(a) The article was already in the “public domain”

56. First, the Court notes that copies of the newspaper were withdrawn and destroyed after the article had been accepted by the editorial board, and after it had been printed and made public. Thus, the article became available to the subscribers and to readers in State libraries. For the purposes of Article 10, after publication of the article, any decision limiting the circulation of the applicant's article should be regarded as an interference with his freedom of expression, notwithstanding the fact that it was taken by the editor-in-chief of the newspaper.

(b) The newspapers were withdrawn because of the content of the applicant's article

57. Second, the Court notes that the main reason for the withdrawal was the content of the applicant's article. The courts which examined the

applicant's civil claims (see paragraph 26 above) did not analyse that aspect of the case. They simply treated the public information business like any other form of business, and the copies of the newspaper like any other product for sale. For them, the newspaper had an unqualified right to dispose of its property (the print run); therefore, the reasons for the withdrawal were irrelevant. However, those reasons are relevant for the Court's analysis under Article 10 of the Convention. The Court will examine that matter in the light of the other materials in the case file, and in particular the findings of the domestic criminal investigation.

58. Mr Svistunov (the editor-in-chief) testified that the applicant's article about the privatisation of the power plant had been interesting and that he had considered it suitable for publication (see paragraph 16 above). Therefore, the article was published not as the result of a mere technical error; the editor-in-chief took an informed decision based on his assessment of the substance and form of the article.

59. If a part of the print run remained unsold after a while, the information in the newspaper would become outdated and, for that reason, the editor-in-chief would have every reason to withdraw the newspaper from sale. In such case there would be no interference with the applicant's freedom of speech. However, this was not the case: it is clear from the decision of 31 January 2003 to close the investigation (see paragraph 17 above) that the decision to withdraw the newspapers was also based on an assessment, albeit different, of the content of the article.

60. The Government appeared to admit this; at the very least, they conceded that the editor-in-chief had withdrawn the newspapers out of fear of possible sanctions (civil or administrative) related to the content of the article at issue.

61. The Court does not detect anything in issue no. 44 that would call for its withdrawal other than the applicant's article. It concludes that the withdrawal was ordered on account of the content of that article. Therefore, the withdrawal can be characterised as an "interference" with the applicant's rights under Article 10 of the Convention. The Court has to ascertain now whether that interference was by the State or by a private actor.

2. Whether the interference was by a State authority

(a) Who ordered the withdrawal?

62. The parties disagreed as to who had ordered the withdrawal. According to the Government, the withdrawal was ordered by Mr Svistunov, the editor-in-chief. The applicant alleged that the withdrawal had been ordered by Rospechat, the distribution agency. His assertion was corroborated by Mr Svistunov's letter of 11 November 2001 to the head of the trade union of the hydroelectric power plant, by his submissions to the Magadan Town Court of 7 April 2003 and, to a certain extent, by his own

submissions to the Court. On the other hand, the Government's account was confirmed by the testimony of the head of Rospechat given on 30 January 2003 and by Mr Svistunov's own testimony given to the investigator on 31 January 2003, as well as by the findings of the domestic courts which established that the withdrawal had been on the newspaper's own initiative.

63. The Court notes that Mr Svistunov's own account was rather inconsistent throughout the domestic proceedings, whereas another direct witness, namely the head of Rospechat, consistently testified that it had been Mr Svistunov's decision to withdraw the newspapers. There is no proof, besides the applicant's words, that the withdrawal request signed by Mr Svistunov had been backdated. The content of Mr Svistunov's letter to the trade union could be explained by his desire to exonerate himself from responsibility for a situation which he apparently regarded as anomalous and which led to his resignation. In sum, the evidence produced by the applicant is insufficient to make the Court depart from the findings of the domestic courts in this respect. The Court concludes that the withdrawal of the newspapers was ordered by the editor-in-chief of *Vecherniy Magadan*.

(b) Did Mr Svistunov represent the municipality?

64. The Court notes that it is unclear whether and to what extent the municipal newspaper or its organs can be equated with the municipality. The Court points out that in *Radio France and Others v. France* ((dec.), no. 53984/00, ECHR 2003-X (extracts); see also *Österreichischer Rundfunk v. Austria*, no. 35841/02, §§ 46 et seq., 7 December 2006), the Court defined the applicable criteria as follows:

“In order to determine whether any given legal person other than a territorial authority falls within the category [of 'governmental organisations'], account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities.”

65. In the case at hand, the newspaper was incorporated as a separate legal entity and, in theory, its editorial board enjoyed a certain degree of freedom in deciding what to publish. This is to some extent confirmed by the fact that the applicant's article had been admitted for publication. Furthermore, the charter of the newspaper proclaimed that the municipality could not oblige the newspaper to publish particular material (other than legislative acts or official notifications).

66. However, the newspaper was set up to provide a public service (informing the population about official and other events in the town) in the form of a “municipal institution”. All of its real property and equipment belonged to the municipality. The editor-in-chief was appointed and paid by the municipality. Although in theory the newspaper was allowed to have independent sources of income (from advertising, for instance), they were of marginal importance and the newspaper existed thanks to the municipality's

funding. Moreover, the municipality had the right to shape the newspaper's editorial policy, at least regarding “strategic” issues (see paragraphs 28 et seq. above).

67. Therefore, the independence of the newspaper was severely limited by the existence of strong institutional and economic links with the municipality and by the constraints attached to the use of its assets and property. Mr Svistunov had a dual role in this set-up: on the one hand he was a professional journalist, with his own ideas and opinions. On the other hand he was required by virtue of his status to ensure the loyalty of his newspaper to the municipality and its policy line.

68. The Court notes that no municipal or other State authority or official ever expressed dissatisfaction with the applicant's article or requested its withdrawal. It appears that the decision of the editor-in-chief to withdraw the newspapers was in fact dictated by his own perception of the situation and his fear of the “negative consequences” which publication of the article might entail. That fear was not specific; it did not relate to any pending (or imminent) legal proceedings or any rule prohibiting such publication in unequivocal terms. Given the overall context of the case, and the dual role played by the editor-in-chief, his decision to withdraw the newspapers can be characterised as an act of policy-driven censorship. The Court concludes that in the circumstances the editor-in-chief implemented the general policy line of the municipality and acted as its agent.

(c) Whether Magadan municipality was a “State authority”

69. The next question to answer is whether an act by a municipal institution can entail the responsibility of the State under the Convention. The Government argued that Magadan municipality was not a “State authority” within the Convention meaning. However, the Court is not convinced by that argument. Firstly, in a number of cases the Court has regarded the debts of municipal enterprises as State debts (see, for example, *Gizzatova v. Russia*, no. 5124/03, 13 January 2005). In a very recent case, also concerning State responsibility for the debts of a municipal enterprise, the Court held that local (that is, municipal) authorities were linked to the State administration (see *Yershova v. Russia*, no. 1387/04, §§ 54 et seq., 8 April 2010). The Court's reasoning in *Yershova* clearly implied that it did not regard municipalities as not being part of the State authorities in the broad sense, even if in domestic terms municipal authorities were independent from regional and federal government. In Russian law municipal authorities are treated on the same footing as federal or regional bodies for many purposes (see, for example, the full text of Article 1070 of the Civil Code of the Russian Federation concerning strict liability of State bodies for certain types of civil wrongs, quoted in *Matveyev v. Russia*, no. 26601/02, § 30, 3 July 2008; see also the analysis of the word “State body” employed in section 57(4) of the Media Act in *Romanenko and*

Others v. Russia, no. 11751/03, § 45, 8 October 2009). The municipal bodies are formed by the local population; they have wide-ranging powers in various areas of life, examples of which can be found in the Court's case-law concerning Russia (see, for example, *Kimlya and Others v. Russia*, nos. 76836/01 and 32782/03, § 53, ECHR 2009-...; *Kuimov v. Russia*, no. 32147/04, § 30, 8 January 2009; and *Kukalo v. Russia*, no. 63995/00, § 33, 3 November 2005). Even if their competence is limited (see, *mutatis mutandis*, *Cherepkov v. Russia* (dec.), no. 51501/99, ECHR 2000-I, where the Court analysed whether municipal bodies had “legislative power” within the meaning of Article 3 of Protocol No. 1 of the Convention), their powers cannot be characterised as anything other than “public”. Therefore, Magadan municipality was a “public authority” within the Convention meaning and the Court has competence *ratione personae* to examine its actions.

70. To sum up, the Court concludes that the withdrawal of copies of the newspaper containing the applicant's article constituted an interference by a public authority with his rights under Article 10 of the Convention. The Court will now examine whether that interference was justified under paragraph 2 of Article 10.

3. *Whether the interference with the applicant's freedom of expression was justified*

71. The Court reiterates that in order to comply with Article 10, the interference in question must be “prescribed by law”, pursue an aim that is legitimate under Article 10 § 2 and be “necessary in a democratic society” in order to achieve that aim.

(a) **Lawfulness**

72. As to the lawfulness of the interference in the instant case, the Court observes that the national law prohibits the “confiscation or destruction” of a print run without a court order (see paragraph 36 above). Apparently, the law deals only with situations where a print run is confiscated or destroyed by a third party – at least that is how it has been interpreted by the domestic courts. On the other hand, the law entitles editors-in-chief to decide on questions relating to the “distribution” of a newspaper. This provision can reasonably be interpreted as allowing a newspaper to withdraw a print run before it is sold without obtaining any authorisation (see paragraph 33 above). The Court is prepared to accept that under domestic law the editor-in-chief had a right to withdraw the copies even after the newspaper had been published.

(b) Legitimate aim

73. As to the “legitimate aim”, the Court notes that the domestic courts did not examine why the copies had to be withdrawn and destroyed. However, from the material in the case file it appears that the withdrawal of the print was aimed, ultimately, at the “protection of the reputation or rights of others”, namely the State officials and managers of Kolymaenergo Plc targeted by the article. The Court is thus prepared to accept that the aim pursued by the editor-in-chief was a “legitimate” one.

(c) Proportionality

74. The article under consideration criticised the manner in which the acquisition of shares in a large State-controlled energy company was organised, and the role of some public officials in it. The Court reiterates that “the management of State assets and the manner in which politicians fulfil their mandate” is by definition “a matter of public interest” (see *Dalban v. Romania* [GC], no. 28114/95, § 48, ECHR 1999-VI). Reporting on matters relating to the management of public resources lies at the core of the media's responsibility and the right of the public to receive information (see *Busuioc v. Moldova*, no. 61513/00, §§ 63-64 and 84, 21 December 2004, and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 94-95, ECHR 2004-XI). In other words, the applicant's article belonged to a class of speech which attracts maximum protection under Article 10 of the Convention. At the same time, despite “the privileged protection afforded under the Convention to the kind of speech in issue”, the applicant was required to act within the bounds set, *inter alia*, in the interest of the “protection of the reputation or rights of others” (see *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 47, ECHR 1999-VIII). What is in issue is whether the applicant exceeded the limits of permissible criticism.

75. In determining such questions the Court should first turn to the domestic decisions. The Court reiterates that, normally, it is not its task to take the place of the national authorities who ruled on the matter and to substitute its own analysis of the facts. The Court's role is rather to review under Article 10 the decisions the domestic courts have taken pursuant to their power of appreciation (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). However, in the specific case at hand the domestic courts did not analyse the content or the form of the article at all. In the eyes of the domestic courts the withdrawal had been ordered by the owner of the product (the newspaper) who had no contractual obligation *vis-à-vis* its producer (the author, that is, the applicant) to continue the sale. In other words, they treated the situation as just another purely business case, possibly coming within the ambit of Article 1 of Protocol no. 1 to the Convention, but not of Article 10 thereof.

76. The Court points out that the relationship between a journalist and an editor-in-chief (or publisher, producer, director of programmes, and so on)

is not only or always a business relationship. In the present case at least it was not so, since *Vecherniy Magadan* was publicly owned and was created not as a profit-making business but as a public utility institution used as a forum for informing the population about the “social, political and cultural life” of the town (see paragraph 28 above). Furthermore, the Court has established that the copies of the newspaper were withdrawn because of the viewpoint expressed in the applicant's article. However, the domestic courts did not consider that the rights of the author of the article required any special protection under Article 10 of the Convention. Basing their findings on the mistaken assumption that the case was basically about the right of the owner to freely dispose of his property, they failed to examine the reasons for the withdrawal of the copies and to balance the applicant's freedom of expression under Article 10 of the Convention against any other interests that may have been at stake (for instance, the reputation of the person targeted by the article). Accordingly, the decision-making process in this case was deficient from the standpoint of Article 10 of the Convention. It is unclear whether this deficiency should be attributed to a lack of diligence on the part of the domestic courts or to the existing legislative framework, which treats such situations as simple “business situations”.

77. In sum, the decisions of the domestic courts did not contain any justification for the withdrawal from the standpoint of Article 10 of the Convention. The Court observes that, to all appearances, the applicant's article concerned an important “matter of public interest”. The truth of the facts related therein has never been challenged. As to the critical views expressed in the article, they were reasonably supported by the facts (see *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II) and were expressed in an acceptable form (see the Court's case-law on the “degree of exaggeration, or even provocation” permissible in political journalism, for example in *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38; see, by contrast, the cases of *Tammer v. Estonia*, no. 41205/98, § 67, ECHR 2001-I, and *Constantinescu v. Romania*, no. 28871/95, § 74, ECHR 2000-VIII).

78. In such circumstances the Court concludes that the withdrawal of the newspapers containing the applicant's article was not necessary and contrary to Article 10 of the Convention. Accordingly, there has been a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. 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.”

80. The Court points out that under Rule 60 of the Rules of Court any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, “failing which the Chamber may reject the claim in whole or in part”.

81. In the instant case, the Court invited the applicant on 9 October 2007 to submit his claims for just satisfaction before 21 January 2008. However, the applicant did not submit any such claims. In view of the above, the Court makes no award under Article 41 of the Convention (see, for example, *Şirin v. Turkey*, no. 47328/99, §§ 27-29, 15 March 2005, and *Pravednaya v. Russia*, no. 69529/01, §§ 43-46, 18 November 2004).

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been a violation of Article 10 of the Convention.

Done in English, and notified in writing on 21 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Christos Rozakis
President