



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

FIFTH SECTION

CASE OF LYASHKO v. UKRAINE

(Application no. 21040/02)

JUDGMENT

STRASBOURG

10 August 2006

FINAL

10/11/2006

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

In the case of Lyashko v. Ukraine,

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

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 10 July 2006,

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

PROCEDURE

1. The case originated in an application (no. 21040/02) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Oleg Valeriyovych Lyashko (“the applicant”), on 18 April 2002.

2. The applicant was represented by Ms Natalya Petrova, a lawyer practising in Kyiv. The Ukrainian Government (“the Government”) were represented by their Agent, Ms Valeria Lutkovska.

3. On 3 February 2005 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

4. On 1 April 2006 this case was assigned to the newly constituted Fifth Section (Rule 25 § 5 and Rule 52 § 1).

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1972 and lives in Kyiv.

6. The applicant was an editor-in-chief of the Ukrainian daily newspaper *Polityka*. The periodical has ceased publication.

1. Newspaper articles, published by the applicant

7. On 2 July 1997 the applicant published an article about Mr V. Durdynets, who at that time was the acting Prime Minister of Ukraine. The article was entitled “*Durdintsovshchina*” (the first article) and described the dismissal of Mr A. Stoginenko, the President of the Black Sea Shipping Company (*Чорноморське морське пароплавство*, hereinafter the “BSSC”), a State-owned enterprise. The applicant alleged that Mr Durdynets dismissed Mr Stoginenko because of his involvement in financing the *Polityka*. The relevant extracts from the article were as follows:

“Who could imagine that a former *Komsomol* bureaucrat, police pen-pusher and near-political schemer would occupy today one of the highest posts in the Government? The press is what the sinister Premier hates the most, as he fears public opinion. He did not forget that in March this year our newspaper accused him of plotting against Prime Minister Lazarenko. And as soon as he got the chance, he triggered the punitive mechanisms to suppress the independent media. For instance, he accused Alekzandr Stoginenko, the President of the Black Sea Shipping Company, of financing *Polityka*. Stoginenko’s “error” was that he had concluded a contract with us to issue promotional materials for the BSSC. The newspaper spent tens of thousand dollars from its own pocket, but has not yet received full payment for the published materials.

Without waiting for the results of a ministerial inquiry, on Monday before last, the acting Prime Minister, in the absence of both the President, who was in New York, and the Prime Minister, who was hospitalised, summoned the Cabinet of Ministers and forced a decision to dismiss the president of the BSSC.”

8. On 16 July 1997 the applicant published an article entitled “Save the barbed wire, citizen Durdinets” (*Економьте колючую проволоку, гражданин Дурдинец* – the second article), where he stated that Mr Durdinets had personally instructed the General Prosecutor to institute criminal proceedings against him. The relevant extracts from the article read as follows:

“...As we have learned, immediately after the release of the article [*Durdintsovshchina*], Durdinets summoned the General Prosecutor, Grigory Vorsinov, to his office and, showing him the newspaper, demanded that criminal proceedings for defamation be instituted against the author... Any other person, who considers himself to be defamed or insulted, would go to a court of law to make his case publicly. But Durdinets has no regard for civil rights as he attempts to use his powers as a high ranking governmental official. So it is worth mentioning here the abuse of power, as neither I nor any of our readers can summon Vorsinov to his office, the less so to demand the institution of criminal proceedings against one’s opponent. The acting Prime Minister considers that he can give orders to the General Prosecutor (although the law provides for the independence of the latter), and he does so.”

9. On 5 November 1997 the applicant wrote an article under the headline “The Rogue and the General” (*Аферист и генерал* – the third article), which concerned the alleged relationship between General G., at that time the Chief of the Odessa Regional Police Department, and a certain Mr S.,

who was reported to have been involved in criminal activity. The applicant's newspaper also published several photographs in which the police chief and Mr S. were pictured together. It appears that these pictures were made during a private occasion and were subsequently published by the paper and TV media (see paragraph 15 below).

The article stated, *inter alia*, that:

"An ... inquiry revealed that ... S. was never employed by the Tax Police. The person who had blackmailed [local businessmen] was a former police officer, S., and the photographs [which he had showed to prove his authority] contained images of high officials of the Odessa Regional Police Department.

But where did the ex-policeman ... get the photographs of G. and his deputies drinking with him and hugging him? Now he is showing these photographs to [businessmen] and thereby collects money for ... life.

The examination of this relationship clarifies the statements of S. ... that 'they will stand for me ...'.

This story seems to prove the corruption in the Odessa Regional Police Department we were writing about."

10. On 19 November 1997 the applicant published an article entitled "The Rogue and the General turn out to be relatives" ("*Аферист и генерал оказались родственниками*" – the fourth article), in which he recited the interview of certain Ms K. to a local TV station to the effect that the Chief of Police and Mr S. were distant relatives:

"The scandal surrounding the head of the Odessa Regional Police Department, General G., continues. Condemned by the press for having patronised criminals, the General stands on firm ground so far.

When we published '*The Rogue and the General*', we did not know that S. and Grigorenko were brothers-in-law. ... The unlawful activity of S. is blessed by the figure of General G...."

2. Criminal proceedings against the applicant

11. On 7 July 1997 the Head of the Parliamentary Committee for Law and Order tabled a written question to the General Prosecutor raising concern as to the publications defaming the acting Prime Minister Durdynets. In July 1997 the General Prosecutor's Office (hereinafter "the GPO"), referring to the extracts from his articles quoted above, charged the applicant with intentional defamation in print (Article 125 § 2 of the Criminal Code of 1961), an unfounded accusation of committing a serious crime (Article 125 § 3) and abuse of power (Article 165).

12. On 9 December 1999 the Pechersky District Court of Kyiv acquitted the applicant for lack of *corpus delicti*. However, in November 2000 the Kyiv City Court, on the prosecutor's appeal, quashed this decision and remitted the case for fresh consideration.

13. On 7 June 2001 the Minsky District Court of Kyiv (hereinafter “the Minsky Court”) found the applicant guilty as charged. In the introductory part of the judgment the court noted the personal data of the applicant and, *inter alia*, stated that he was “previously unconvicted” (*раніше не судимий*).

14. With respect to the first and second articles, the court indicated that the applicant, having abused his office, published intentionally false and malicious statements to the effect that Mr Durdynets had persecuted the *Polityka*, had unlawfully dismissed Mr Stoginenko for his financing the newspaper and had summoned the General Prosecutor to his office with a view of giving him an order to institute criminal proceedings against the applicant.

15. As regards the third and fourth articles, the Minsky Court stated that the applicant, again abusing his office, had intentionally defamed the law enforcement agencies of Ukraine by publishing libellous and false information regarding General G., namely that Mr S. was involved in criminal activity and that Mr G. had had illegal links with this person. The court found that the statements that Mr S., aided and abetted by General G., had extorted money from local businessmen and that they were family related were false and offensive. This conclusion was made on the basis of, *inter alia*, testimonies of S. and a witness Z. who stated that the photographs, published by the *Polityka*, were taken at a private party, but somehow made their way to the paper and TV media. The police officers, who had investigated the complaints of the businessmen about the alleged extortions, also gave oral evidence, stating that the proceedings in the case were terminated on the early stage of the pre-trial investigation due to the lack of any *corpus delicti*.

16. The Minsky Court concluded that the applicant, as an editor-in-chief, was directly liable for any abusive material published in the newspaper. Using his office, the applicant had intentionally published false statements aimed at defaming the police in revenge for a certain unspecified previous conviction.

17. The applicant was convicted of abuse of power, intentional defamation in print and an unfounded accusation of committing a grave offence and sentenced to two years’ imprisonment on probation and a two years prohibition on occupying posts involving media management.

18. On 18 October 2001 the Kyiv City Court of Appeal upheld the applicant’s conviction in substance, indicating that the fact that the imputed offences had been committed was proved by a wide range of evidence, collected by the prosecution. In particular, the court came to the conclusion that the applicant had made intentionally false and offensive statements concerning the unlawful dismissal of Mr Stoginenko and Mr Durdynets’ summons of the General Prosecutor to his office, the criminal activity of S. and his liaisons with General G., thus committing offences under Articles 125 and 165 of the Criminal Code, 1961. However, the appellate instance

quashed the applicant's sentence for intentional defamation in print and an unfounded accusation of committing a grave offence as these offences had been decriminalised by the new Criminal Code adopted in 2001. As regards the third offence imputed to the applicant – abuse of office – the applicant was exempted from punishment on account of expiry of the statutory limitation period.

19. On 23 July 2002 the Supreme Court upheld the decision of the Kyiv City Court of Appeal.

II. RELEVANT DOMESTIC LAW

1. Constitution of Ukraine of 1996

20. Relevant extracts from the Constitution read as follows:

Article 32

“... Everyone is guaranteed judicial protection of the right to rectify incorrect information about himself or herself and members of his or her family, and of the right to demand that any type of information be rectified, and also the right to compensation for material and moral damage inflicted by the collection, storage, use and dissemination of such incorrect information.”

Article 34

“Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.

Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice.

The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crime, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or maintaining the authority and impartiality of justice.”

2. The Criminal Code of 1961

21. The text of Article 125 of the Code was as follows:

Defamation [*Наклеп*], namely the intentional dissemination of falsehoods aimed at damaging the reputation of another shall be punishable by ...

Defamation in print ... shall be punishable by up to three years' imprisonment or a fine from 50 to 100 minimal monthly salaries.

Defamation linked with an unfounded accusation of committing a grave offence shall be punishable by up to five years' imprisonment.

Article 165 of the Code provided as follows:

Abuse of power or office, namely intentional, lucrative or with other personal interest or the interest of third persons, use by official of his/her power or office against the interest of service, if it caused serious damage to the State or public interests or to lawful interests of natural or legal persons shall be punishable by between two and five years' imprisonment or by up to two years' correctional labour with up to three years' prohibition of employment in certain occupations."

3. The Criminal Code of 2001

22. Article 364 of the Code provides that:

Abuse of power or office, namely intentional, lucrative or with other personal interest or the interest of third persons, use by official of his/her power or office against the interest of service, if it caused serious damage to the State or public interests or to lawful interests of natural or legal persons shall be punishable by up to two years' correctional labour or by up to six months' arrest or by up to three years' limitation of freedom with up to three years' prohibition of employment in certain occupations."

4. The Code of Criminal Procedure

23. The text of Article 27 of the Code (hereafter "the CCP"), as worded until 21 June 2001, was as follows:

"The cases concerning crimes stipulated in Articles 125 ... of the Criminal Code of Ukraine, if the damage is caused to the rights and interests of citizens are instituted only upon the complaint of the victim, who conducts the prosecution in court. In such cases there is no pre-trial investigation.

...If the case concerning any crime referred to in paragraph 1 of this Article has special public interest ...the prosecutor may institute the case in absence of the victim's complaint. The case instituted by the prosecutor should be sent to the pre-trial investigation and, thereafter, is tried under the general rules."

5. The Law "on Prosecution" of 1991

24. Article 17 of the Law provides that the General Prosecutor's Office is staffed with "senior investigators for particularly serious cases" and "investigators for particularly serious cases".

25. Further relevant material regarding the state of freedom of press in Ukraine at the material time may be found in the judgment of 29 March 2005 in the case of *Ukrainian Media Group v. Ukraine* (no. 72713/01, §§ 18-22 and 25-26).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant complained that his trial and conviction constituted an unjustified interference with his right to freedom of expression. He relied on 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...

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.”

II. SCOPE OF THE CASE

27. The Court observes that further new complaints were submitted after the communication and in response to the Government's objections as to the admissibility and merits of the application and concerned multiple oppressions from the authorities, allegedly suffered by the applicant and his newspaper before, during and after the impugned criminal trial. In particular he stated that publishing houses were pressed not to publish the *Polityka*, that between July 1999 and February 2000 the publication of the newspaper was prohibited by the court injunction and that in March-April 2002 another criminal case was instituted against the applicant regarding an article about Mr Potebenko (at that time the General Prosecutor). Charges in the latter case were dropped in December 2004.

28. The Government made no comments.

29. In the Court's view, the new complaints are not an elaboration of the applicant's original complaint to the Court about the criminal proceedings concerning the four articles published in the *Polityka* newspaper in July-November 1997 on which the parties have commented. The Court considers, therefore, that it is not appropriate now to take these matters up separately (cf. *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

III. ADMISSIBILITY

30. The Government argued that the applicant could not claim to be a victim of the alleged violation within the meaning of Article 34 of the Convention. They maintained that since the charges against the applicant were dismissed on appeal and the applicant received no criminal record, neither his professional life nor his freedom of expression was impaired by the criminal proceedings in issue.

31. The applicant submitted that as the result of five years of criminal persecution he had suffered severe stigma and distress and incurred significant expenses. The lengthy trial placed restrictions on the exercise of his professional activity and obstructed the publication of the newspaper.

32. The Court observes that a criminal prosecution was brought against the applicant. Although he was eventually exempted from punishment, this was at partially for the technical reason that the prosecution was time barred and partially due to the enactment of the new Criminal Code, which decriminalised two of three offences imputed to the applicant (see paragraph 18 above). In fact, the appellate court upheld the applicant's conviction for abuse of power in substance but absolved him from punishment on the non-exonerating grounds. The decision of 18 October 2001 was couched in terms which left no doubt as to the court's view that the applicant had committed the one of the offences with which he was charged (see paragraph 18 above). The courts' decisions, therefore, gave a strong indication to the applicant that the authorities were displeased with the publications and that, unless he modified his behaviour in future, he would run the risk of being prosecuted again for abuse of office, which, unlike two other offences imputed to the applicant, remained punishable by the new Code (paragraph 22 above).

33. In these circumstances, the Court considers that the applicant could properly claim to have been directly affected by the criminal proceedings in issue and, therefore, to be the victim of a violation of the Convention (see *Bowman v. the United Kingdom*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, § 29).

34. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds.

IV. MERITS

A. Arguments of the parties

1. The Government

35. The Government conceded that there was an interference with the applicant's rights under Article 10 of the Convention. However, they considered that this measure was lawful, having its basis in Article 124 of the Criminal Code, Article 47 of the Law on Information and Article 26 of the Printed Media Act and pursued a legitimate aim, namely the protection of the reputation and rights of others.

36. As regards the proportionality of the impugned measure, the Government maintained that the "interference" complained of was necessary in a democratic society as it corresponded to a "pressing social need". In that they pleaded that during the trial it was proved that the applicant's publications did not concern any matter of public interest but rather contained intentionally false information and tended to damage the reputation of high ranking State officials. Referring to the Court's case-law on the question, the Government emphasised that the press should not overstep the limits of acceptable criticism. In accusing the police officer concerned of being involved in criminal activity the applicant had not only damaged his reputation but had also undermined public confidence in the police.

37. The Government also indicated that the punishment imposed on the applicant following his conviction (two years' imprisonment on probation and a two year's prohibition on occupying posts involving media management) was proportionate to the aims pursued. In their submissions the Government also recalled that, in any case, the applicant was absolved from serving the sentence passed upon him as it was quashed by the Court of Appeal.

2. The applicant

38. The applicant stated that protection of the reputation and rights of others cannot be invoked as an aim in the present case, since the victims of the alleged offences were entitled under domestic law to bring civil cases for libel or to seek institution of "private prosecution" proceedings if they considered themselves insulted by the impugned publications. However, in the present case the criminal investigation was instituted by the GPO following the parliamentary inquiry of one of the Prime Minister's political allies. Thus, the measure in question was not motivated by any legitimate considerations, but represented an attempt to intimidate an independent journalist.

39. The applicant also maintained that the four articles concerned issues of general interest. He pointed out that the dismissal of Mr Stoginenko without calling him out to the Cabinet's meeting did take place; that several businessmen in Odessa did complain to the Regional Police Department about extortions by the former police officer S. and that the subsequent police inquiry confirmed the alleged facts. The political issues affecting the management of one of the Ukrainian key shipping companies and corruption in the police undoubtedly constituted subjects of serious public debate.

40. The applicant is further of the view that his conviction was based primarily on the testimonies of the alleged victims and did not establish beyond the reasonable doubt their innocence of involvement in the corrupt practices referred to in the articles.

B. The Court's assessment

1. General principles

41. The Court reiterates the following fundamental principles in this area:

(a) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. 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". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (cf., *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, p. 23, § 31; *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I; *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII; and *Fuentes Bobo v. Spain*, no. 39293/98, § 43, 29 February 2000).

(b) The press plays an essential role in a democratic society. Although it must not overstep certain bounds, regarding in particular protection of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, including those relating to justice (see *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, pp. 233-34, § 37 and, *mutatis mutandis*, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 92-110, ECHR 2004-...). Not only does it have the task of imparting such information and ideas: the public also has

a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog” (see *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 27, § 63). Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, p. 25, § 57). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38, and *Thoma v. Luxembourg*, no. 38432/97, §§ 45 and 46, ECHR 2001-III).

(c) Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays her- or himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, § 42).

(d) The limits of acceptable criticism may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. It cannot be said, however, that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to criticism of their actions. Civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks. It may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty (see *Janowski*, cited above, § 33 and *Nikula v. Finland*, no. 31611/96, § 48, ECHR 2002-II).

(e) Moreover a clear distinction has to be made 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, p. 28, § 46).

(f) The nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference (cf., *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV, and *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001-I). Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. Nevertheless it remains open to

the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith (see *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, § 46).

2. Application of the above principles in the present case

42. The Court recalls that in the present case the applicant, following a five-year long trial, was found guilty of defaming an acting Prime Minister and a high-ranking police official in four newspaper articles and abusing power, but was not punished as the former offence was decriminalised and the latter one was time barred.

43. The Court notes that the conviction incontestably amounted to an interference with the applicant's exercise of his right to freedom of expression. The question arises whether such interference can be justified under the second paragraph of Article 10. It therefore falls to be determined whether the interference was "prescribed by law" and had a "legitimate aim" for the purposes of that paragraph and was "necessary in a democratic society".

a. Whether the measure was prescribed by law and pursued a legitimate aim

44. The applicant stated that the contested prosecution was unlawful and unjustified as the prosecution had been initiated by the GPO, whereas the alleged victims of the defamation were free to bring a civil or private criminal action against him.

45. The Court notes that the competent courts based their decisions on Articles 125 and 165 of the Criminal Code (paragraphs 11 and 13 above). The public prosecution's participation in the proceedings was based on, *inter alia*, Article 27 of the CCP. As regards the applicability of the latter provision in the present case it should be noted that its wording provided that the instances of "special public interest" could attract the participation of the prosecution authorities in the criminal proceedings for defamation (paragraph 19 above). Since the applicant does not dispute the presence of such "special public interest" in this case, his allegations concerning the victims' possibility to resort to alternative remedies has no bearing on the fact that the impugned measure was sufficiently foreseeable for the purpose of Article 10 § 2 of the Convention. It was moreover designed to protect "the reputation or rights of others" and there is nothing to show that it had any other purpose.

46. The conviction was accordingly "prescribed by law" and had a legitimate aim under Article 10 § 2 of the Convention.

b. Proportionality

47. The Court must next verify whether the interference was justified and necessary in a democratic society, and in particular whether it was proportionate and whether the reasons given by the national authorities in justification for it were relevant and sufficient. It is thus essential to determine whether the national authorities made proper use of their power of appreciation in convicting the applicant of defamation and abuse of power.

48. The Court is not convinced by the Government's argument that the information was not a matter of public interest. The first two articles were dedicated to the issues of management of the Black Sea Shipping Company, a State company, which at the material time was a subject of a number of commercial disputes, widely reported in the press and, by implication, to the redistribution of authority after the fall of a former Prime Minister Lazarenko (see paragraph 7 above). The third and fourth articles concerned corruption in the police, a matter of general concern in Ukrainian media. They described alleged links between a person under investigation and the Chief of Police, provoking, or else being provoked by the wide media coverage of this story in the local media (see paragraphs 9 and 10 above).

49. In the first article the applicant was concerned with the new Prime Minister's attitude towards the free press and the second must be seen as its continuation. As stated in the third article it was dedicated to the "corruption in the Odessa Regional Police Department" with the furtherance of this theme in the fourth. The Court finds no reason to doubt these intentions. In particular, there is no evidence that the applicant was in any way prejudiced against the subjects of his articles. Admittedly, although the Minsky Court in its judgment of 7 June 2001 mentioned the applicant's certain former conviction as a reason for bias towards the police, in the introductory part of this judgment the applicant was defined as "previously unconvicted person" (see paragraph 13 above). In any case it is unsubstantiated that the applicant was unduly influenced in his activity as an editor-in-chief by a former conviction.

50. As regards the first two articles, the applicant was convicted because he had allegedly disseminated false information that Mr Durdinets had unlawfully, out of personal bias dismissed Mr Stoginenko and called out the General Prosecutor to give an order to prosecute the applicant. The Court notes that the fact that Mr Stoginenko was dismissed without a hearing by the Cabinet has never been questioned by the Government as well as the applicant's assertion that such dismissal was a violation of the procedure then in force. It should further be noted that the articles were written during the political turmoil triggered by the transfer of power from the former Prime Minister Lazarenko to his successor.

Therefore, the applicant's assertions that the dismissal in issue was unlawful and caused by personal bias on the part of Mr Durdynets are value

judgments used in the course of public debate which are not susceptible of proof.

51. The statement contained in the second article about the alleged meeting between Mr Durdynets and the General Prosecutor, was based on the fact that it was the GPO that instituted proceedings against the applicant and was made when the applicant was apparently ignorant as to the parliamentary question that had triggered the investigation. Admittedly, where allegations are made about the conduct of a third party, it may sometimes be difficult, as in the instant case, to distinguish between assertions of fact and value judgments. Nevertheless, even a value judgment may be excessive if it has no factual basis to support it (see *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II). The Court considers that the applicant's view must be seen in the content of the GPO's involvement in his case, although this body is usually entrusted with investigation of "particularly serious cases" (see paragraph 24 above). The Court finds that the applicant's statement, at the time and in the circumstances it was made, cannot be considered as devoid of any reasonable foundation. Moreover, the very scene of the alleged meeting between the Prime Minister and the General Prosecutor was described in sarcastic and broad terms and could be understood by readers as having been presented with a degree of exaggeration (see, *mutatis mutandis*, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 67, ECHR 1999-III)

52. It should further be noted that the third and fourth articles alluded to Mr S., a private person. However, as it transpires from the court decisions, the applicant was convicted mainly for having published defaming material regarding Mr Durdynets and General G., whereas the violation of the right of Mr S. to private life was considered rather as a "side effect" of the applicant's "unlawful" activity, which alone could not attract the GPO's involvement in the proceedings or the applicant's conviction for abuse of power. The more so since, according to his own testimonies, the activity of Mr S. and his alleged bonds with General G. were reported by, *inter alia*, the local TV stations, thus the applicants' articles could not be considered as the only or even the major intrusions into his privacy (see paragraphs 10 and 15 above).

53. Insofar as the applicant's conviction for the third and fourth articles is concerned, it is to be noted that the trial court found that the statements that Mr S. with help from General G. had extorted money from local businessmen and that Ms S. and General G. were relatives were untrue. The Court notes that the articles took as their starting-point a criminal case instituted against S. for extortion. As transpires from the June 2001 judgment of the Minsky Court this event did actually occur. The remainder of the factual elements referred to in the articles emanated from persons other than the applicant, namely the said businessmen, whose complaints commenced an investigation into the matter. Moreover, this information was to some extent supported by the pictures published in the applicant's

newspaper and broadcasted over the local TV stations. The interview of Ms K. shown on local TV was the source for the applicant's allegation that Mr S. and General G. were distant relatives (see paragraph 15 above).

The statement that "the unlawful activity of S. is blessed by the figure of General G." was a value judgment which, in the circumstances, cannot be said to be devoid of any arguable basis.

54. The Court also notes that there are no factual elements to show that the articles in issue were motivated by the applicant's deliberate intention to damage the reputation of the persons concerned or the police force in general.

55. In short, the applicant was essentially reporting what was being said by others, or what could be reasonably inferred from the events that have undisputedly taken place. In so far as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible task (see, *mutatis mutandis*, *Thorgeir Thorgeirson*, cited above, § 65).

56. The Court accepts that all four articles were framed in a particularly strong terms. However, having regard to the fact that they were written on matters of serious public interest and concerned public figures and politicians, the Court is of the opinion that the language used cannot be regarded as excessive.

57. The Court finds that the applicant's conviction and sentence to two years' imprisonment and a prohibition on occupying posts in media management, imposed following a trial lasting several years could have had a considerable "chilling effect" on the applicant's freedom of expression, which cannot be said to be substantially mitigated by the decision of the appeal court given the fact that his conviction was upheld in substance and that he was not punished at least partially because of procedural reasons and partly due to the decriminalisation of the imputed offences in the new Criminal Code.

58. Having regard to the foregoing, the Court has come to the conclusion that the reasons advanced by the Government do not suffice to show that the interference complained of was proportionate to the legitimate aim pursued. It was therefore not "necessary in a democratic society".

59. Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. 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

61. The applicant claimed 100,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

62. The Government considered this amount exorbitant and unsubstantiated.

63. Making its assessment on equitable basis, as required by Article 41 of the Convention, the Court considers it reasonable to award the applicant a global sum of EUR 2,000 in respect of damages.

B. Costs and expenses

64. The applicant claimed UAH 24,000 (EUR 3,840) for the costs and expenses incurred in the Convention proceedings.

65. The Government did not comment on this issue.

66. The Court reiterates that in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII). In the present case the Court finds excessive the total amount which the applicant claims in respect of his legal costs and expenses and considers that it has not been demonstrated that they were necessarily and reasonably incurred.

67. In these circumstances, the Court is unable to award the totality of the amount claimed; deciding on an equitable basis it awards him the sum of EUR 1,000 in respect of costs and expenses, plus any tax that may be chargeable on that amount.

C. Default interest

68. 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*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention the following amounts:
 - (i) EUR 2,000 (two thousand euros) in respect of pecuniary and non-pecuniary damage;
 - (ii) EUR 1,000 (one thousand euros) in respect of costs and expenses;
 - (iii) any tax that may be chargeable on the above amounts;
 - (b) that the above amounts shall be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
 - (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 August 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President