



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

FIFTH SECTION

CASE OF MARCHENKO v. UKRAINE

(Application no. 4063/04)

JUDGMENT

STRASBOURG

19 February 2009

FINAL

19/05/2009

This judgment may be subject to editorial revision.

In the case of Marchenko v. Ukraine,

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

Peer Lorenzen, *President*,

Rait Maruste,

Karel Jungwiert,

Renate Jaeger,

Mark Villiger,

Isabelle Berro-Lefèvre, *judges*,

Stanislav Shevchuk, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 27 January 2009,

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

PROCEDURE

1. The case originated in an application (no. 4063/04) 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 Mykhaylo Illarionovych Marchenko (“the applicant”), on 19 December 2003.

2. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that he had been subjected to an unfair trial resulting in his unfair conviction for defamation.

4. On 12 April 2007 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1946 and lives in Pasiky-Zubrytski.

A. Events which led to criminal charges against the applicant

6. Since 1974 the applicant has worked as a teacher in the Lviv Boarding School no. 6 for Children with Language Disorders (“the School”). In 1995 he was elected head of the school branch of the “VOST” - one of the two trade unions represented in the School.

7. On 12 January 1996 the local Board of Education employed Mrs P. to serve as a director, notwithstanding opposition from some staff, in particular the VOST members.

8. In May 1996 Mrs P. dismissed an employee, who was a VOST member, without the consent of the VOST. Subsequently, in 1998, this employee was reinstated as a result of a court action brought on her behalf by the VOST.

9. On 6 June 1996 Mrs P. refused to sign a collective agreement, signed by the VOST and the head of the second trade union present at the School.

10. On an unspecified date in late 1996, a former School driver who had been dismissed by Mrs P. for incompetence submitted a written statement to the applicant, alleging that in April 1996 Mrs P. had ordered him to unload ten boxes of humanitarian aid intended for the School at her father’s estate and that on many occasions she had used the school vehicle for personal purposes.

11. In early 1997 the applicant in his capacity as a trade union leader made several applications to the Control Inspection Department (*Контрольно-ревізійне управління*, a public audit service, scrutinising the use of funds by State-owned entities, “the KRU”), alleging that Mrs P. had abused her office and misused School property and funds. In particular he stated that Mrs P. had appropriated ten boxes of humanitarian aid, the School’s TV set, other video equipment and bricks from the school boundary wall which had been demolished. On several occasions the applicant also complained about the situation to Mr U., the regional leader of the VOST.

12. In response to these complaints in 1997 the KRU held several inquiries into the use of the School funds.

13. In its report of 28 February 1997, the KRU stated that there were no serious instances of mismanagement of the School’s property.

14. The KRU’s report of 26 March 1997, however, revealed certain shortcomings on the part of the School administration in the handling of humanitarian aid, charity and the bricks. However, no evidence was found that any of the humanitarian aid or charity monies or any bricks had been appropriated by Mrs P.

15. In April 1997 the applicant on behalf of the School branch of the VOST, Mr U. on behalf of the Regional VOST, and Mr N. on behalf of the local branch of the Ukrainian Conservative Party made a criminal complaint against Mrs P. to the Lychakivsky District Prosecutor’s Office (“the

Prosecutor's Office") a criminal complaint against Mrs P., referring largely to the same circumstances as in the VOST's complaints to the KRU. On 28 April 1997 the Prosecutor's Office dismissed this complaint for want of evidence of criminal conduct on Mrs P.'s part. On 17 June 1997 a second criminal complaint was dismissed on the same ground. However, criminal proceedings were initiated into the circumstances of the disappearance of the TV set and the video equipment.

16. On 26 May 1997 several representatives of the Regional VOST picketed the Lychakivsky District Administration protesting against the alleged abuses by Mrs P. The participants in the picket carried placards with various slogans criticising Mrs. P. and her deputy Mrs N., as well as their supporters within the local administration. The slogans concerning Mrs P. read as follows: "*Mrs P. and Mrs N. - return humanitarian aid and 20,000 bricks from the school wall to the disabled children*"; "*Boarding school no. 6 director Mrs P. and her clique of VOST persecutors [should be submitted] to court*"; and "*Mrs P. and Mrs N., sticky hands off the disabled children of Boarding school no. 6*".

B. Criminal proceedings against the applicant

17. In May 1998 Mrs P. brought a private prosecution against the applicant. She complained, in particular, that in his letters to the KRU and the Prosecutor's Office the applicant had falsely accused her of abuse of office and misappropriation of public funds and that he had organised and participated in the picket of 26 May 1997, during which the demonstrators displayed offensive placards. Mrs P. further concluded that the applicant's actions fell within the ambit of Article 125 § 2 (defamation in print) and § 3 (false accusation of serious crimes) and Article 126 (insult) of the Criminal Code of 1960 in force at the material time.

18. On 14 May 1998 a judge of the Lychakivsky District Court of Lviv found that the applicant's conduct *vis-à-vis* Mrs P. fell within the ambit of Article 125 § 1 of the Criminal Code (simple defamation) and Article 126, and initiated criminal proceedings against the applicant. The judge further ordered that the applicant be placed under an undertaking not to abscond.

19. In the course of the investigation, the charges against the applicant were re-qualified from Article 125 § 1 to Article 125 § 3.

20. On 12 November 1999 the Prosecutors' Office notified the applicant of his indictment under Article 125 § 3 and Article 126 of the Criminal Code.

21. On 15 November 1999 the investigation prepared a final bill of indictment under these provisions and gave the applicant access to the case file before its transfer for court proceedings.

22. On 26 January 2000 the Lychakivsky District Court held the first hearing in the applicant's case.

23. In March 2000 the applicant's case was transferred to the Shevchenkivsky District Court of Lviv ("the Shevchenkivsky Court").

24. On 26 June 2001 the Shevchenkivsky Court found the applicant guilty of an offence under Article 125 § 3 as charged and dropped charges under Article 126 as redundant. It sentenced him to one year's imprisonment suspended for one year and to a fine of 200 Ukrainian hryvnas (UAH). The court also allowed Mrs P.'s civil claim in part and ordered the applicant to pay her UAH 1,000 in non-pecuniary damages and UAH 100 in legal fees.

25. In its judgment the court established that in numerous letters signed by the applicant, Mrs P. had been baselessly accused of misappropriation of public funds. The court also found that the applicant had initiated and participated in the picketing of 26 May 1997, referring to various pieces of evidence, including submissions by several School employees that they had seen him during the picket holding a slogan.

26. The applicant appealed against the judgment of 26 June 2001. He alleged in particular that the prosecution had failed to prove that he had intentionally disseminated falsehoods. Furthermore, no attention had been accorded to the fact that he had acted in his official capacity as a local VOST leader, empowered by the union members to inform the authorities about Mrs P.'s official misconduct and that according to the findings of the KRU and the law-enforcement authorities his accusations had not been entirely baseless. The applicant further denied any involvement in the picketing, referring to his absence on the photographs of the picket made by the plaintiff as well as to a doctor's certificate concerning his inpatient treatment until 27 May 1998. He also alleged that the case could not be considered under § 3 of Article 125 of the Criminal Code, as pursuant to the decision of 14 May 1998 criminal charges filed by Mrs P. under this provision had been re-qualified as charges under § 1 of Article 125.

27. On 21 August 2001 the Lviv Regional Court of Appeal heard the case in the applicant's absence and upheld the judgment of 26 June 2001. It found, in particular, that the applicant's guilt, including in respect of participation in the picketing, had been proved by numerous sources of evidence. In particular, several School employees attested to having seen the applicant holding a slogan during the picketing and his doctor stated that his treatment had not precluded him from leaving the hospital premises.

28. The applicant filed eleven cassation appeals, which were dismissed due to his failure to follow formalities envisaged by law. On 25 April 2003 a judge of the Supreme Court declared the applicant's twelfth appeal in cassation, in which he raised essentially the same arguments as in his appeal, admissible.

29. On 13 November 2003 the Supreme Court upheld the previous judgments.

II. RELEVANT DOMESTIC LAW

1. Criminal Code of 1960

30. The text of Article 125 of the Code read 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

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

31. Article 126 of the Code provided as follows:

"Insult [*Образа*], namely the intentional humiliation of the honour and dignity of a person expressed in an indecent form shall be punishable by ..."

32. Following a process of legislative reform, the New Ukrainian Criminal Code of 5 April 2001 no longer classifies defamation and insult as criminal offences.

2. Code of Criminal Procedure

33. The text of Article 27 of the Code of Criminal Procedure (governing the private prosecution proceedings, as in force before 21 June 2001) may be found in the judgment of 10 August 2006 in the case of *Lyashko v. Ukraine* (no. 21040/02, § 23).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION ON ACCOUNT OF FORMULATION OF THE CHARGES

34. The applicant complained that he had been found guilty of an offence with which he had not been charged. He referred to Article 4 of Protocol No. 7 in this regard. The Court, which is master of the characterisation to be given in law to the facts of the case, finds that this complaint falls to be examined under Article 6 §§ 1 and 3 (a) and (b) of the Convention, which read as follows:

"...Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;....”

35. The Government argued that the applicant’s complaint, as formulated, could not be read as stating that fair trial guarantees had been compromised. They further submitted that the applicant’s rights under Article 6 of the Convention had been duly observed in every way.

36. The applicant disagreed. He maintained that the criminal proceedings against him were generally unfair. He further noted that he had not been able to understand fully the nature and the scope of charges against him and to prepare his defence accordingly. In particular, he had been indicted under Article 125 § 3 of the Criminal Code, while the criminal proceedings had been initially instituted with reference to Article 125 § 1 of the same Code.

37. The Court reiterates that the rights guaranteed under Article 6 § 3 (a) must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. It further notes that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 52, ECHR 1999-II). The Court also considers that subparagraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused’s right to prepare his defence (*ibid.*, § 54).

38. Turning to the facts of the case, the Court notes that the court hearings in the applicant’s case, leading to his eventual conviction under Article 125 § 3 of the Criminal Code of 1961 in force at the material time, were held between January 2000 and June 2001. In the meantime, the applicant had been notified of his indictment under the above criminal provision on 12 November 1999 and had further been given full access to the case file on 15 November 1999. In these circumstances the Court finds that the applicant has not made out a valid claim concerning lack of proper notification of the charges against him or availability of necessary time and facilities for preparation of his defence. This part of the application is therefore manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

39. The applicant further complained that his conviction for defamation was contrary to Articles 10 and 11 of the Convention. The Court finds that the applicant’s right to freedom of expression is at the heart of this complaint, which falls to be examined under Article 10 of the Convention. The relevant provision 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. Admissibility

40. The Court notes that this complaint 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. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

41. The applicant contended that his conviction was not “necessary in a democratic society”. As a union leader, not only did he have the right, but he was under a direct duty to bring up the information concerning Mrs P.’s purported abuses. His complaints about her official misconduct directed to the competent authorities and to the Head of the Regional VOST had been drafted in good faith and pursued legitimate public interest. As regards the picketing, the applicant had neither organised it nor had taken part in it or designed the slogans. He could not therefore be held responsible for any dissemination of defamatory information during this action, which, according to his information, had been organised by the Regional VOST and the local branch of the Conservative Party.

42. The Government acknowledged that the applicant’s conviction for defamation constituted interference with his rights guaranteed under Article 10 of the Convention. They maintained, however, that this interference was in accordance with the law, pursued a legitimate aim, namely the protection of Mrs P.’s reputation, and was necessary in a democratic society. In this regard they submitted that the applicant had overstepped the limits of permissible criticism of a civil servant, in particular, as he had directly accused Mrs P. of having committed serious criminal offences, thereby undermining her right to presumption of

innocence. Furthermore, the financial penalties imposed on the applicant had not been disproportionate to his income, and the prison sentence was not long and in any case the applicant had not served it.

2. *The Court's assessment*

43. The Court notes at the outset that the domestic judicial authorities referred to two sets of facts as the basis for the applicant's conviction: the letters which he had sent to the KRU and the prosecutor's office demanding investigations into Mrs P.'s purported official misconduct and the picket of 26 May 1997, which he had organised and taken part in.

44. The Court finds it indisputable that the applicant's conviction for defamation under Article 125 § 3 of the Criminal Code constituted interference with his rights guaranteed under Article 10 of the Convention; and that this interference was in accordance with the law and pursued the legitimate aim of protecting Mrs P.'s reputation. It remains to be determined whether this interference was "necessary in a democratic society" or whether, in the circumstances of the present case, a fair balance was struck between the protection of the applicant's freedom of expression and Mrs P.'s reputation, a right which, as an aspect of private life, is protected by Article 8 of the Convention (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 90-91, ECHR 2004-XI).

45. In this regard the Court considers at the outset that the applicant was directly accusing Mrs P. of misappropriation of public funds and property, as well as abuse of her office as a director of a State boarding school. Notwithstanding the particular role played by the applicant in his capacity as union representative, as well as that his statements, which related to official conduct of a public employee, were as such a matter of public concern, the Court finds that he had a duty to react within limits fixed, *inter alia*, in the interest of "protecting the reputation or rights of others", including the presumption of innocence (see *Constantinescu v. Romania*, no. 28871/95, § 72, ECHR 2000-VIII). Moreover, the applicant was obliged to have regard to the duty of loyalty, reserve and discretion owed by him to his employer (see, for example, *Guja v. Moldova* [GC], no. 14277/04, § 70, ECHR 2008-...).

46. The Court further states that the signalling by an employee in the public sector of illegal conduct or wrongdoing in the workplace must be protected, in particular where the employee concerned is a part of a small group of persons aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large (see *Guja*, cited above, § 72). In the light of the duty of discretion referred to above, such disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public (see *Guja*, § 73).

47. In light of these principles, the Court finds that, as regards the fact that the applicant signed several letters to the KRU and the prosecutors' office demanding investigations into Mrs P.'s official conduct, he cannot be reproached for doing so in bad faith, in particular, as he had acted on behalf of his trade union and presented various materials in support of his allegations. The Court finds, therefore, that, in so far as the interference with the applicant's freedom of expression was based on the above letters addressed to the competent authorities, its "necessity" in the present case has not been established.

48. In so far as the applicant's conviction was, however, based on his participation in the picketing of 26 May 1997, the Court notes that the applicant's contention that he had personally not organised and not participated in the action was rejected by the domestic courts of three levels of jurisdiction following adversary proceedings, in the course of which a wide range of evidence, including witness statements, was examined. In the absence of any *prima facie* evidence of procedural unfairness, the Court is not in a position to review this factual conclusion.

49. The Court further notes that the picketing took place following the inquiry by the KRU, revealing some mismanagement of the school property and a further investigation by the prosecutors' office into the allegation of official misconduct against Mrs P. On 28 April 1997 the latter, however, resulted in refusal to institute criminal proceedings against Mrs P. for want of inculpatory evidence. One allegation (appropriation of the School video equipment) subsequently led to initiation of criminal proceedings. However, no evidence had been either adduced by the applicant or collected by the prosecution to implicate Mrs P. in the incident. According to the case file materials neither the applicant nor his supporters ever attempted to employ any procedural means available under domestic law to challenge the inefficiencies of the investigations by the KRU or the law-enforcement officials and the refusals to institute criminal proceedings against Mrs P.

50. In the meantime, some slogans displayed during the picketing in front of the District Administration building were phrased in particularly strong terms, directly accusing Mrs P. of misappropriation of School property (see § 16 above). The Court finds that these accusations could, in the circumstances, be taken as allegations of fact, which, in the absence of sufficient proof of their validity could reasonably be deemed defamatory and undermining of Mrs P.'s right to be presumed innocent of serious offences.

51. Regard being had to the nature of the accusations against Mrs P. displayed in the slogans, the applicant's duty of discretion *vis-à-vis* his employer and the fact that he engaged in the public picketing before exhausting other procedural means of complaining about Mrs P.'s official misconduct, the Court accepts that the domestic authorities acted within their margin of appreciation in considering it necessary to convict the

applicant for defamation, in so far as his actions concerned organisation of and participation in the picketing. What remains to be determined is whether the interference in issue was proportionate to the legitimate aim pursued, in view of the sanctions imposed (see *Constantinescu*, cited above, § 110).

52. In this regard the Court notes that, besides being ordered to pay fine and a sum in compensation to Mrs P., the applicant was sentenced to one year's imprisonment. The Court considers that, while the Contracting States are permitted, or even obliged, by their positive obligations under Article 8 of the Convention to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals' reputations, they must not do so in a manner that unduly hinders public debate concerning matters of public concern, such as misappropriation of public funds (see, *mutatis mutandis*, *Cumpănă and Mazăre*, cited above, § 113). It further considers that the circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of public interest – presented no justification for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect on public discussion, and the notion that the applicant's sentence was in fact suspended does not alter that conclusion particularly as the conviction itself was not expunged (see, *mutatis mutandis*, *Cumpănă and Mazăre*, cited above, § 116 and *Salov v. Ukraine*, no. 65518/01, § 115, ECHR 2005-VIII (extracts)).

53. Overall, the Court finds that, in convicting the applicant in respect of the letters he sent to KRU and the prosecutor's office, and in imposing a lengthy suspended prison sentence at the end of the proceedings, the domestic courts in the instant case went beyond what would have amounted to a "necessary" interference with the applicant's freedom of expression.

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

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

55. The applicant also complained under Article 6 § 1 and 3 (c) of the Convention that he had not been duly summoned for the hearing before the Court of Appeal and that the criminal proceedings against him had lasted an unreasonably long time. Lastly, he relied on Article 13 of the Convention and Article 2 of Protocol No. 7 without further specification.

56. Having considered the applicant's submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

57. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 1, 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant claimed pecuniary damage in the amount of the fine and the compensation paid by him to Mrs P. as well as 820 euros (EUR) in medical expenses allegedly sustained on account of stress caused by his unfair criminal persecution. He also claimed EUR 5,000 in respect of non-pecuniary damage.

60. The Government contested these claims as unsubstantiated.

61. Regard being had to the nature of the violation found in the present case, the Court finds no causal link between it and the pecuniary damage claimed by the applicant. It therefore dismisses the claim for pecuniary damage. The Court accepts, on the other hand, that the applicant has suffered non-pecuniary damage – such as distress and frustration resulting from violation of his right under Article 10 of the Convention – which cannot be sufficiently compensated by the mere finding of a violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,000 under this head.

B. Costs and expenses

62. The applicant also claimed UAH 5,800 in legal fees, translation and copying expenses and UAH 336.74 in postal expenses incurred in connection with his correspondence with the Court as well as with various domestic authorities. He presented receipts for the postal services.

63. The Government submitted that the applicant’s claim was substantiated only in so far as it related to his correspondence with the Court.

64. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 50 covering costs under all heads.

C. Default interest

65. 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 complaint under Article 10 admissible and the remainder of the application inadmissible;
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, EUR 1,000 (one thousand euros) in respect of non-pecuniary damage and EUR 50 (fifty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant, to be converted into the currency of Ukraine at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President