



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

FIFTH SECTION

CASE OF MYRSKYY v. UKRAINE

(Application no. 7877/03)

JUDGMENT

STRASBOURG

20 May 2010

FINAL

20/08/2010

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

In the case of Myrskyy v. Ukraine,

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

Peer Lorenzen, *President*,

Karel Jungwiert,

Rait Maruste,

Mark Villiger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska, *judges*,

Mykhaylo Buromenskiy, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 27 April 2010,

Delivers the following judgment:

PROCEDURE

1. The case originated in an application (no. 7877/03) 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 Rudolf Yakovych Myrskyy (“the applicant”), on 26 February 2003.

2. The applicant was represented by Mr V. Tsirbas, a lawyer practising in Strasbourg. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Yu. Zaytsev.

3. The applicant alleged, in particular, that his right to freedom of expression had been violated and that the civil proceedings against him had been unfair and excessively long.

4. On 9 September 2003 the Court decided to give notice of the application to the Government.

5. On 1 February 2005 the Court 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

6. The applicant, Mr Rudolf Yakovych Myrskyy, is a Ukrainian national who was born in 1932 and lives in Lviv. He is a Doctor of Philosophy and a political science professor, who also holds leading positions in the Holocaust International Centre, the Association of National Minorities in the Lviv Region, and the International Anti-Fascist Congress.

7. In March 1999 the applicant took part in a round table organised by the association “For Inter-Ethnic Peace and Concord in Ukraine” on the occasion of the International Week against Racism.

8. On 26 March 1999 the newspaper *Ukraine and the World Today* (*Україна і світ сьогодні*) published selected excerpts (compiled by its journalist Mr L.) from statements by certain participants, including the applicant, under the headline 'Judaophobia at the political level?' (*Юдофобія на рівні політики?*). One of the arguments ascribed to the applicant read as follows:

“Unfortunately, judaophobia may be observed not only in social behaviour, but also in politics. For example, the self-styled Party of Ukrainian Unity [*Партія української єдності*], which professes the aim of instilling in people an ideology and a psychology of national extremism, is kicking off its activities in Lviv.”

9. On 28 April 1999 thirteen members of the founding committee of the Party of Ukrainian Unity brought defamation proceedings against the applicant and the newspaper's editorial office before the Zaliznychnyy District Court of Lviv (“the Zaliznychnyy Court”). They alleged, in particular, that the applicant's statement, as cited above, was untruthful, defamatory and injurious to their honour, dignity and reputation, as well as debasing the future party's image. The plaintiffs sought a public disclaimer and apologies by the applicant and the editorial office, as well as compensation for non-pecuniary damage.

10. On 11 August 1999 the court requested the plaintiffs to specify their claim concerning the non-pecuniary damage and to submit additional documents, which they did on 27 October 1999.

11. On 21 June 2001 the court further requested the plaintiffs to submit some other documents concerning the party's registration.

12. On the same date the judge dealing with the case sent the defendants a copy of the above claim for comments. The same letter informed them that the hearing of the case was scheduled for 9 July 2001.

13. According to the judge's explanation given to the applicant in July 2003 on the latter's request, the claim remained unexamined during the period from 28 April 1999 to 2 October 2001 “due to the pre-judicial preparations”. It was also noted in the aforementioned letter that the judge, by virtue of his status, was under no obligation to provide the applicant with further explanations.

14. The applicant objected to the claim, contending that the impugned sentence was the journalist's own interpretation of his words taken out of context. Relying on his right to freedom of expression enshrined in Article 34 of the Constitution, the applicant submitted that during the round table he had expressed his view of a political scientist as regards an emerging political force. He also brought to the attention of the court several publications concerning the foundation of the Party of Ukrainian Unity in Lviv, which had appeared in the local newspapers in 1998-99 and

which contained, according to him, an indication of that party's extremist trends.

15. The Zaliznychnyy Court heard one of the round table's organisers, who stated that the journalist had paraphrased and edited the applicant's original statement to make it appear harsher.

16. Mr L., who had prepared the impugned publication, was questioned as a witness and submitted that it was a verbatim record of the applicant's statement made at the round table. He noted however that the audio tape had been destroyed on the expiry of the one-year statute of limitations period established for bringing defamation proceedings.

17. During the hearings some of the plaintiffs used the word “yid” referring to Jews, which the applicant found pejorative and protested against its usage. The court allowed his complaint and directed the plaintiffs to avoid using that term.

18. By a judgment of 7 March 2002 the court allowed the plaintiffs' claim in part. It considered it established, firstly, that the impugned statement had indeed been made by the applicant, and, secondly, that it had been untruthful and defamatory. The court ruled as follows:

“To oblige R. Myrskyy and the editorial office of the newspaper *Ukraine and the World Today* to publish (...) a disclaimer worded as follows: “The statement of Rudolf Myrskyy published in the article 'Judaophobia at the political level?' of 26 March 1999: “For example, the self-styled Party of Ukrainian Unity, which professes the aim of instilling in people an ideology and a psychology of national extremism, is kicking off its activities in Lviv” is untruthful. The editorial office and the author sincerely regret having published it and offer their apologies to the founders of the Party of Ukrainian Unity”.

19. The court held that publication of the aforementioned disclaimer and apologies would constitute sufficient compensation to the plaintiffs for any non-pecuniary damage sustained.

20. On an unspecified date in July 2002 the court issued additional reasoning to the above judgment, which reflected its findings as follows.

21. Having examined the statute and the programme of the party in question, the court noted the absence of any provisions inciting racial hatred or disparaging attitudes towards national minorities and held that the applicant's statement was inconsistent with the true facts and therefore injurious to the plaintiffs' dignity and reputation.

22. Furthermore, the court made reference to the testimony of Mr L., who claimed to have reproduced the impugned statement literally and without omission. It also referred to some extracts from a book co-authored by the applicant, which contained arguments similar in style and wording to the statement complained of.

23. Regarding the applicant's allegation that his words had been misrepresented and that they were a value judgment, the court “assessed them critically, having regard to the explanations given at the hearing by the witness [Mr L.] and to the assessment of the other evidence adduced”.

24. Finally, with regard to the background publications in other newspapers invoked by the applicant, the court concluded that they could not be considered as providing basis for absolving him from his responsibility in the examined defamation case.

25. The applicant appealed. He also subsequently lodged some comments on the minutes of the hearings before the first-instance court, which were allegedly dismissed in his absence.

26. On 9 September 2002 the Lviv Regional Court of Appeal found against the applicant, upholding the judgment of 7 March 2002 and reproducing almost literally its reasoning.

27. The applicant brought a cassation appeal, in which he argued that his statement had been a value judgment made in the context of a free political debate. He submitted that the mentioned value judgment had a factual basis, as the extremist tendencies had indeed been shown by the plaintiffs in some publications (which he had invoked earlier) and by their usage of the pejorative term “yid” during the hearings. Lastly, the applicant brought to the attention of the cassation court the fact that the plaintiffs' claim had been stayed without any procedural steps in the first-instance court for more than two years, which had led to the loss of a crucial piece of evidence (the audio tape of the round table).

28. On 12 October 2002 the disclaimer and apologies were published in the newspaper *Ukraine and the World Today* in enforcement of the judgment of the Zaliznychnyy Court of 7 March 2002.

29. On 31 March 2003 the Supreme Court dismissed the applicant's cassation appeal as unsubstantiated.

II. RELEVANT DOMESTIC LAW AND PRACTICE

30. The relevant domestic law and practice concerning the freedom of expression and defamation proceedings are summarised in the judgment *Ukrainian Media Group v. Ukraine*, no. 72713/01, §§ 22-25 and 27-32, 29 March 2005.

31. According to Article 143 of the Code of Civil Procedure of 1963 (repealed with effect from 1 September 2005), pre-judicial preparations by a judge dealing with a newly registered civil claim may include the following, depending on the particularities of each case: requesting additional evidence from the plaintiff, explanation of the procedural rights and duties to the plaintiff and/or the defendant, taking decisions about participation of third persons, representatives of non-governmental organisations or prosecution authorities, as well as summoning witnesses, requesting evidence from state or other institutions, and ordering measures for securing the claim. After the registration of a civil claim, the first-instance court has seven days for the aforementioned preparations, or, in exceptional cases, twenty days (Article 147 of the Code).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. The applicant complained about a violation of his right to freedom of expression under Article 10 of the Convention, which reads in its relevant part 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 ... for the protection of the reputation or rights of others ...”

A. Admissibility

33. The Court notes that the present complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The submissions by the parties

34. The Government contended that there had been no interference with the applicant's right to freedom of expression in the present case. They underlined in this connection the wording of the disclaimer and apologies ordered by the domestic courts, according to which those had been “the editorial office and the author”, who had to provide them. Given the fact that, on one hand, the applicant had never admitted authorship of the impugned statement, and, on the other hand, that the author of the compilation which had contained the disclaimed statement, was the newspaper's journalist Mr L., the Government considered that the court order had not affected the applicant's rights under Article 10 of the Convention.

35. Regardless of this observation, the Government maintained that even assuming that there had been an interference with the applicant's right to freedom of expression, it was prescribed by law and was necessary in a democratic society for the protection of the reputation of others.

36. The applicant contested both aforementioned arguments.

2. *The Court's assessment*

37. The Court observes the domestic courts found against the applicant in civil defamation proceedings, which as a rule will suffice to amount to an “interference” with the exercise of his right to freedom of expression (see, for example, *Kuliś and Różycki v. Poland*, no. 27209/03, § 34, 6 October 2009).

38. The Court does not accept the Government's submission that the courts' findings bore no consequences for the applicant. It observes that the domestic courts obliged the applicant, along with the newspaper's editorial office, to disclaim the impugned statement and to offer public apologies to the plaintiffs through a publication in the same newspaper. The text of the disclaimer, as ordered by the Zaliznychnyy Court and upheld by the higher courts, clearly and unambiguously stated that “the statement of Rudolf Myrskyy (the applicant) ... is untruthful” (see paragraph 18 above). While it further referred to “the editorial office and the author” as regretting that publication and presenting their apologies to the plaintiffs, it is clear from the overall text that it referred to the applicant as the author in question, but not the journalist who had prepared the compilation. It is unlikely that a reader not familiar with the background of the case or even those aware of the proceedings (in which the journalist had never been involved as a defendant) would come to any other interpretation.

39. The Court therefore considers that domestic court's findings concerning the applicant and the order to apologise by way of newspaper disclaimer constituted an interference with the applicant's freedom of expression in this case and dismisses the Government's argument in that regard.

40. As to the nature of the interference, the Court notes that the proceedings against the applicant and the newspaper were civil rather than criminal, with the result that there was no risk of criminal liability being established. Further, the applicant was not ordered to pay damages to the plaintiffs, and was not, it appears, required to pay for the insertion of the apology in the newspaper. Accordingly, the interference with the applicant's rights, although it did take place (see paragraph 39 above), was rather limited.

41. The Court considers that the interference at issue was prescribed by law within the meaning of Article 10 § 2 of the Convention (see *Ukrainian Media Group*, cited above, § 50) and intended to pursue a legitimate aim – the protection of the reputation and rights of others. Hence, the only point at issue is whether the interference was “necessary in a democratic society” to achieve that aim.

42. According to the Court's well-established case-law, 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 that 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 (see *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

43. On the issue whether the interference was necessary “in a democratic society”, the Court reiterates that this depends on whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III). The Court's task is not to take the place of the national courts but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (*ibid.*, § 60, and, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Veraart v. the Netherlands*, no. 10807/04, § 61, 30 November 2006). The nature and severity of the penalty are also factors to be taken into account (see *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V, with further references).

44. Turning to the present case, the Court notes that one of the applicant's key arguments in the defamation proceedings was his denial of the authenticity of the impugned statement published following the round table with his participation. The applicant submitted to the domestic courts, in particular, that the original statement expressed by him had been couched in milder terms and had a broader context. The courts found against him on that point after considering the evidence which was before them: the submissions of the applicant and one of the organisers of the round table on the one hand, and those of Mr L, who had prepared the article in *Ukraine and the World Today*, on the other. In the ordinary course of events, in the absence of *prima facie* evidence of procedural unfairness the Court would accept such findings of the domestic courts (see, for example, *Marchenko v. Ukraine*, no. 4063/04, § 48, 19 February 2009). In the present case, however, the first-instance court carried out pre-judicial investigations during the whole of the period from the bringing of the proceedings in April 1999 until 21 June 2001, when the defendants were informed of the proceedings. By then, however, apart from the fact that pre-judicial enquiries should have been terminated within a maximum of twenty days from registration of the civil claim (see paragraph 31 above), the newspaper had destroyed the tape recording of the proceedings as it took the view that

the prescription period of one year had expired. The unfortunate result was that by not dealing with the case, or even informing the defendant of its existence, until the evidence which could well have shed a conclusive light on the issue had been destroyed, the first-instance court had put itself in a position in which its assessment of the relevant facts was restricted.

45. Regardless of the question of authenticity of the statement at issue, the Court notes that the statement attributed to the applicant dealt with a number of issues, and the domestic courts' findings that it was defamatory also comprised several parts. Thus the statement in *Ukraine and the World Today* contended that the Party of Ukrainian Unity was beginning its activities in Lviv, and also contended that the Party professed the aim of instilling in people an ideology and a psychology of national extremism.

46. The first-instance court, whose reasoning was confirmed by the superior courts, did not make any findings as to whether the Party was beginning its activity in Lviv. It did, however, find that the Party did not profess "the aim of instilling in people an ideology ... of national extremism", and went on to conclude that the statement was not only untrue, but also that it was defamatory.

47. As to the finding that the Party had as an aim the instillation of extreme nationalist ideology, the Court notes that the applicant was able to bring all the evidence he wished in order to support his claims in this regard (see and contrast with *Jerusalem v. Austria*, no. 26958/95, § 45, ECHR 2001-II), but the courts nevertheless decided that the aims of the Party were to be established on the basis of its programme, and therefore found against the applicant on the point.

48. As to the conclusion which the courts drew from the factual findings that the applicant had indeed made the statement as printed and that it was erroneous, namely the conclusion that the statement was defamatory, the domestic courts gave no reasoning, but merely concluded from the finding that the facts were untrue, that they were also defamatory.

49. It is in this connection that the Court recalls that 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, for example, *Lingens v. Austria*, 8 July 1986, § 46, Series A no. 103, and *Oberschlick v. Austria* (no. 1), cited above, § 63).

50. In the present case, even accepting the domestic courts' findings of fact, it appears that no consideration whatever was given to the question of whether the applicant's statement amounted to defamation or whether, given the political context in which it was initially delivered and subsequently reported, it fell to be regarded as part of a broader debate, or whether it was of such a nature as to be defamatory of the plaintiffs notwithstanding that context. In spite of the applicant's arguments, the courts failed to recognise that the case before them involved a conflict between the right to freedom of

expression and the protection of the reputation and the rights of others, let alone undertaking a balancing exercise between the interests involved (compare and contrast *Tomasz Wolek, Rafał Kasprów and Jacek Łęski v. Poland* (dec.), no. 20953/06, 21 October 2008).

51. It follows that the domestic courts failed to give relevant and sufficient reasons for their finding that the statements ascribed to the applicant were defamatory of the plaintiffs.

52. Whilst bearing in mind that the penalty imposed on the applicant was slight (see paragraph 40 above), the Court considers that it cannot compensate for that failure.

53. It follows that there has been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

54. The applicant complained that the defamation proceedings against him had been unfair, since the domestic courts had allegedly failed to address his contentions founded on his right to freedom of expression. In addition to complaining about some minor procedural breaches (dismissal of his remarks to the hearings' minutes in his absence and delayed reasoning by the first-instance court), the applicant also submitted that the length of the proceedings had been unreasonable given a considerable period of inactivity on the part of the first-instance court, which had led to the loss of an important piece of evidence. The applicant relied on Article 6 § 1 of the Convention, which provides, in its relevant part, as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ...”

A. Admissibility

55. The Court notes that these complaints are closely linked to the Article 10 complaint and must therefore likewise be declared admissible.

B. Merits

56. Having regard to the findings relating to Article 10 of the Convention (see paragraphs 44 and 50-53 above), the Court considers that it is not necessary to examine these issues separately (see, *mutatis mutandis*, *Flux v. Moldova* (no. 1), no. 28702/03, § 36, 20 November 2007).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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

58. The applicant claimed 100,000 Ukrainian hryvnias (UAH) in respect of non-pecuniary damage.

59. The Government contested this claim. They considered that a finding of a violation would constitute sufficient just satisfaction.

60. The Court accepts that the applicant has suffered non-pecuniary damage, such as distress and frustration resulting from the 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 1,200 euros (EUR) under this head.

B. Costs and expenses

61. The applicant also claimed UAH 2,600 for costs and expenses incurred before the domestic courts and UAH 20,000 for those incurred before the Court.

62. The Government submitted that the amounts claimed were baseless and excessive.

63. According to the Court's case-law, an applicant is entitled to reimbursement of his 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, the Court notes that the applicant failed to submit any documents in support of his claims. The Court therefore makes no award under this heading.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds* that there is no need to examine separately the complaints under Article 6 § 1 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,200 (one thousand two hundred euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 May 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President