

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

FIFTH SECTION

CASE OF ZHVAVYY v. UKRAINE

(Application no. 6781/13)

JUDGMENT

STRASBOURG

20 September 2022

This judgment is final but it may be subject to editorial revision.



In the case of Zhvavyy v. Ukraine,

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

Lado Chanturia, *President,*
Ganna Yudkivska,
Mattias Guyomar, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 6781/13) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 14 January 2013 by a Ukrainian national, Mr Petro Mykolayovych Zhvavyy, born in 1959 and living in Pugachivka ("the applicant"), who had been granted legal aid and was represented before the Court by Mr A.S. Kychenok, a lawyer practising in Kyiv;

the decision to give notice of the complaint concerning the applicant's freedom of expression to the Ukrainian Government ("the Government"), represented by their Agent, Mr I. Lishchyna, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 24 March 2022,

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

SUBJECT MATTER OF THE CASE

1. The case concerns defamation proceedings initiated against the applicant for the statements he had made in his complaints to the law-enforcement authorities and before the courts. It raises an issue under Article 10 of the Convention.

2. The applicant, K.T. (wife of the then chairman of the High Council of Justice, K.V.) and Ch. (K.V.'s friend, according to the applicant) were co-founders of a company. In 2010, following decisions taken by K.T. and Ch., the applicant lost his shares in the company and was dismissed from his position as the company's managing director. The applicant instituted proceedings against K.T. and Ch. and lodged complaints with the police and the prosecutor's office in that connection. In his written submissions during the trial and his complaints to the law-enforcement authorities the applicant alleged that K.V. had used his high position and influence on others, including judges, to assist his wife and other persons in appropriating the company from the applicant. He submitted, *inter alia*, that "because the defendant is the wife of K.V., the head of the High Council of Justice, who .... is overseeing the illicit acquisition of [the applicant's] assets", "Such illegal behaviour on the part of the co-founders is directed by K.T.'s husband, who is the head of the High Council of Justice", "K.V. gave instructions to

[the presiding judge in the applicant's case]", "most likely, the wish of K.V. To my knowledge, [K.V.] is putting pressure on both the police and the prosecutor's office and controlling the proceedings in the Uman Town Court. He is covering up the illegal actions of [the acting head of the company] and others", "I believe that she signed the report while under pressure from the head of the High Council of Justice, K.V.", "It follows from the above that R., in agreement with Ch., K.V. and ..., colluded in forgery".

3. In February 2012 K.V. initiated defamation proceedings against the applicant, arguing that the applicant had made insulting and false statements about him which had affected his reputation and daily life. The courts found against the applicant and ordered him to pay 160,000 Ukrainian hryvnias (UAH) (about 15,000 euros (EUR) at the time) for having insulted the claimant. They noted in particular that the contested information had been "disseminated" by the applicant and contained factual allegations which had not been proven by the applicant to be true. The applicant's arguments, including that his statements had not been made publicly, but rather had been expressed as written complaints to the courts and the law-enforcement authorities and therefore could not be the subject of defamation proceedings, were dismissed by the courts as unsubstantiated. The final decision in the defamation case was delivered on 31 August 2012 by the Higher Specialised Civil and Criminal Court, which rejected the applicant's request for leave to lodge a cassation appeal against the judgments of the lower courts.

4. In order to enforce the judgment in K.V.'s favour the bailiffs attached the applicant's property and accounts; as from December 2020, they have been withholding a part of the applicant's pension. According to an information note of the State Bailiff's Service dated 12 February 2021, which has been made available to the Court by the Government, a total amount of UAH 804,89 (about EUR 24 at the time) has been seized from the applicant within the enforcement proceedings.

THE COURT'S ASSESSMENT

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

5. Relying on Articles 6 and 13 of the Convention, the applicant essentially complained that finding him liable for defaming K.V. could not be regarded as necessary in a democratic society and had breached his right to freedom of expression. The Court, being master of the characterisation to be given in law to the facts of the case, considers that the applicant's complaint is to be examined under Article 10 of the Convention only.

6. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other ground. It must therefore be declared admissible.

7. The general principles applied in cases which concern a conflict between the right guaranteed by Article 10 of the Convention and the rights of the person targeted by the contested remarks have been summarised in *Axel Springer AG v. Germany* ([GC], no. 39954/08, §§ 83-84, 7 February 2012) and *Von Hannover v. Germany* (*(no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 104-07, ECHR 2012).

8. It is common ground between the parties that the judgments delivered in the defamation proceedings constituted an "interference" with the applicant's right to freedom of expression protected by Article 10 § 1. The Court is also prepared to accept that the interference had a basis in domestic law, notably Articles 280 and 297 of the Civil Code, and "pursued a legitimate aim", that of protecting the reputation or rights of others. However, the Court cannot agree with the Government that the sanction imposed on the applicant was appropriate in the circumstances of the case and that the reasons given by the national authorities to justify it were relevant and sufficient.

9. The statements in respect of which the applicant was found liable (see paragraph 2 above) amounted to an allegation that K.V., a high-ranking official in the judicial system, had used his influence on judges, law-enforcement bodies and the company's staff to assist his wife and Ch. in depriving the applicant of his assets (shares and his post in the company). Although these allegations were serious, the language used was not strong, abusive or immoderate. Furthermore, the impugned statements were made in written pleadings submitted to the courts during the trial and in correspondence with law-enforcement bodies, but not publicly (see *Bezymyannyy v. Russia*, no. 10941/03, § 39, 8 April 2010, and *Siryk v. Ukraine*, no. 6428/07, § 45, 31 March 2011), for instance verbally in front of members of the public (contrast *Janowski v. Poland* [GC], no. 25716/94, § 33, ECHR 1999-I), and no press or other form of publicity was involved (contrast *Coutant v. France* (dec.), no. 17155/03, 24 January 2008, and *Morice v. France* [GC], no. 29369/10, § 140, ECHR 2015). Any negative impact on K.V.'s reputation stemming from the applicant's allegations was therefore rather limited.

10. Moreover, the allegations set out in the applicant's complaints to the law-enforcement authorities were made with the primary purpose of having them examined by the competent authorities. There is nothing to suggest that the applicant did not act within the framework established by law for making such complaints (see *Zakharov v. Russia*, no. 14881/03, § 26, 5 October 2006, and *Siryk*, cited above, § 42). The mere fact that the complaints led to inquiries cannot be seen as unduly impinging on K.V.'s reputation (see *Shahanov and Palfreeman v. Bulgaria*, nos. 35365/12 and 69125/12, § 63, 21 July 2016).

11. The applicant's use of such phrases as "to my knowledge", "most likely", "I believe" and "it follows" indicates that some of his statements were value judgments that represented his subjective assessment of K.V.'s

behaviour. The burden of proof in respect of these statements was obviously impossible to satisfy (see *Savitchi v. Moldova*, no. 11039/02, § 49, 11 October 2005).

12. It further appears from the applicant's appeals to the courts in the defamation proceedings that he attempted to put forward evidence in support of his allegations against K.V. by requesting that the courts summon certain witnesses and by submitting an audio recording of an alleged conversation with a judge. However, there is no evidence that the national courts paid any attention to the applicant's requests; instead, they apparently treated them as irrelevant.

13. Lastly, the Court notes the significant amount of compensation the applicant was ordered to pay. Regard being had to the nature of the applicant's statements, the manner in which they were communicated and the effect that they could possibly have had on K.V., the Court is not satisfied that there were exceptional circumstances justifying the imposition of such a severe sanction (see, for the relevant principles, *Morice v. France* [GC], no. 29369/10, §§ 175 -76, ECHR 2015).

14. In view of the foregoing considerations, the Court finds that the defamation proceedings resulted in an excessive and disproportionate burden being placed on the applicant. There has therefore been a violation of Article 10 of the Convention.

II. OTHER COMPLAINTS

15. In his response to the Government's observations filed on 4 May 2021, the applicant raised new complaints, relying on Article 6 of the Convention and Article 1 of Protocol No. 1, concerning the alleged failure of the domestic courts to duly examine evidence in his case and the excessive amount of the fine he had been ordered to pay as a sanction.

16. The Court considers that, even assuming that these last-mentioned grievances fall within the scope of the case, which is questionable given the timing of their introduction, it is not necessary to examine them separately on admissibility or merits in view of its above conclusion under Article 10 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

17. The applicant claimed 15,000 euros (EUR) in respect of pecuniary damage, corresponding to the amount which he had been ordered to pay the claimant as a result of the domestic courts' judgments, and EUR 3,000 in respect of non-pecuniary damage. He further claimed EUR 1,000 in respect of costs and expenses incurred before the Court, to be paid directly into the account of his representative, Mr Kychenok; the applicant submitted the relevant documents.

18. The Government contested those claims.

19. The Court notes that in the present case it has found a violation of the applicant's rights under Article 10 of the Convention. It takes the view that there is an obvious link between this violation and the pecuniary damage sustained by the applicant (see, for instance, *Ukrainian Media Group v. Ukraine*, no. 72713/01, § 75, 29 March 2005). However, it appears from the case file that to date the applicant has not paid the full amount of the compensation to K.V. The applicant did not provide sufficient details in that regard to the Court. According to the latest information provided by the Government, the applicant had paid out about EUR 24 and was under obligation to pay the reminder (see paragraph 4 above). Consequently, the Court awards the applicant EUR 24 in respect of pecuniary damage. It further considers that reopening of the civil proceedings would be the most appropriate way to redress any other pecuniary damage suffered by the applicant in view of the violation of Article 10 established by the Court.

20. Ruling on an equitable basis and having regard to all the circumstances of the case, it also awards the applicant EUR 2,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

21. Finally, having regard to the documents in its possession, the Court awards the applicant the amount claimed in respect of costs and expenses, less EUR 850 granted by way of legal aid, plus any tax that may be chargeable to the applicant.

22. The Court further considers it appropriate that the default interest rate 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 of the Convention 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 on admissibility or merits the new complaints under Article 6 of the Convention and Article 1 of Protocol No.1;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 24 (twenty-four euros), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(iii) EUR 150 (one hundred fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid directly into the account of Mr Kychenok;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 September 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller	Lado Chanturia
Deputy Registrar	President