CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 11932/03
by Andrey LOMAKIN
against Russia

The European Court of Human Rights (First Section), sitting on 17 November 2005 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application lodged on 17 March 2003,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Andrey Gennadyevich Lomakin, is a Russian national, who was born in 1972 and lives in Volgograd. The applicant is a lawyer. The respondent Government are represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

1. *The publications*

In 2001 the applicant published two articles in the regional newspaper "Day by Day. Tsartisyn – Stalingrad - Volgograd"[1]("*День за днем. Царицын - Сталинград - Волгоград*"). Both articles inquired into the circumstances of granting a new flat to Ms S., a judge of the Volgograd Regional Court and chairperson of the Regional Judges' Qualification Panel.

The first article, under the headline "Legitimised Judge" ("*Судья в законе*"), appeared in the issue of 20-26 April 2001. The second article, entitled "Voluntary Retirement of a Judge" ("*Добровольная отставка судьи*"), was printed in the issue of 4-10 May 2001.

The publications alleged that Judge S. had taken advantage of her position in order to obtain a four-room flat for her family of three and that she had given her old flat to her adult daughter instead of surrendering it back to the council as required by law. The second article suggested that Judge S. had applied for her resignation fearing an inquiry into her deeds.

2. *Defamation action against the applicant*

Judge S. sued the applicant for defamation. She submitted that the applicant's assertions about her having unlawfully obtained a better housing were of a libellous nature. She considered defamatory the following extract from the first article:

> "The Law on the Status of Judges in the Russian Federation is applied selectively in the Volgograd Region and its application is related not only to the high status of judges, but also to their office... thus it may be understood that the equality of all [citizens] before law and courts ends where we talk about judges themselves. Hence the rule is 'the law is like a rudder, it goes where you bend it'."

Judge S. also regarded the following passages from the second article as defamatory:

> "...on having received a new flat, [Judge S.] should have surrendered the one she had occupied in the past. However, the 'surrendering' only happened through privatisation [of the old flat] and its subsequent sale. In this way Judge S. of the Volgograd Regional Court dramatically 'improved her living conditions' – now she has got a new flat of a bigger surface and money for the old one."

> "Judge S. was forced to retire because of other circumstances... A visit of a high-ranking official from the Supreme Judges' Qualification Panel of Russia who came to investigate the complaints of Judge Ch. [concerning the termination of his powers]

1. The city of Volgograd was called Tsaristyn until 1925 and then Stalingrad until 1961.

> has helped S., the chairperson of the judges' qualification panel for the Volgograd Region, to make a decision on her retirement."

3. Annulment of the applicant's bar membership

On 4 March 2002 the Judges' Council of the Volgograd Region (*Совет судей Волгоградской области*) sent a letter to the President of the Volgograd Bar, of which the applicant was a member, requesting that the applicant's bar membership be annulled. The letter referred to the applicant as an unethical lawyer who had published articles of "clearly libellous nature" and who attempted to exercise "illicit and immoral" influence on Judge S. to have her action withdrawn. The letter contained the following passage:

> "Realising the well-founded character of the action lodged and attempting to avoid a public declaration on the unlawfulness of his acts by a court decision, [the applicant] resorts to impermissible means, which violate the generally recognised moral standards, seeking to have [Judge S.] withdraw her claim in the court."

On 29 March 2002 the Presiding Committee of the Volgograd Bar passed a decision to annul the applicant's membership because of "unethical performance of his duties". The decision referred to disciplinary sanctions that had been imposed on the applicant in the past.

On 15 November 2002 the Voroshilovskiy District Court of Volgograd upheld the Presiding Committee's decision. The applicant did not appeal against the judgment.

4. Judicial decisions in the defamation action

On 18 April 2002 the Dzerzhinskiy District Court of Volgograd granted the defamation action. The court found that the applicant had not produced any evidence in support of his assertions that Judge S. had unlawfully refused to surrender her old flat or that her retirement had been somehow connected with the inquiry by a high-ranking official. The court also held that the headline of the first article "Legitimised Judge" was also damaging to Judge S.'s reputation:

> "The court considers that a mass reader knows from the press, television, literature and essays, as well as from one's personal experience, that the term 'legitimised thief' [*вор в законе*] refers to a person with a long criminal record who enjoys respect and authority in the criminal milieu. The headline 'Legitimised Judge' stylistically clearly alludes to the term 'legitimised thief' and semantically it is implied here that the 'judge' is a criminal. On this ground the court holds that the headline of the article damages honour, dignity and professional reputation of Judge S. because the [applicant] failed to produce any evidence of a breach of any laws by the plaintiff."

The court held the applicant liable for 12,000 Russian roubles ("RUR", approximately EUR 400).

The applicant lodged a statement of appeal in which he contested the reasons of the judgment of 18 April 2002. A copy of the statement has not been made available to the Court.

On 2 October 2002 the Volgograd Regional Court, sitting in a three-judge formation, upheld the judgment of 18 April 2002.

B. Relevant domestic law

Constitution of the Russian Federation

Article 29 guarantees freedom of thought and expression, together with freedom of the mass media.

Civil Code of the Russian Federation of 30 November 1994

Article 152 provides that an individual may apply to a court with a request for the rectification of "statements" ("*сведения*") that are damaging to his or her honour, dignity or professional reputation if the person who disseminated such statements does not prove their truthfulness. The aggrieved person may also claim compensation for losses and non-pecuniary damage sustained as a result of the dissemination of such statements.

COMPLAINTS

1. The applicant complains under Article 10 of the Convention about a violation of his right to impart information.

2. The applicant complains under Article 6 § 1 of the Convention that the action against him was not examined by an independent and impartial tribunal because the Judges' Council had referred to the publications as being "clearly libellous" even before the judgment was made and because Judge S. was a judge in the Volgograd Regional Court which heard the action on appeal.

THE LAW

1. The applicant complained about a violation of his right to freedom of expression under Article 10 of the Convention which reads:

> "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...

> 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."

The Government submit that the information about Judge S.'s "manipulations" with her flat and forced retirement, contained in the articles written by the applicant, was found by the domestic courts to have been untrue. These allegations were damaging to her professional reputation as a judge of the regional court and member and chairperson of the regional qualification panel. The applicant did not act in good faith as he failed to verify the truthfulness of his allegations.

The applicant claims that his articles contained value-judgments and that he was found liable for defamation for expressing his opinion.

The Court notes, and it is not disputed by the parties, that there was an interference with the applicant's right to freedom of expression. The interference was "prescribed by law", notably Article 152 of the Russian Civil Code, and served the legitimate aim of "the protection of the reputation or rights of others". It remains to be considered whether the interference was "necessary in a democratic society", that is whether it 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 Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether a pressing social need exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10. Thus, the Court's task in exercising its supervisory function is not to take the place of the national authorities 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 (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). The national margin of appreciation is circumscribed by the interest of a democratic society in enabling the press to exercise its vital role of "public watchdog" in imparting information of serious public concern (see *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 500, § 39).

Turning to the circumstances of the present case, the Court observes that the applicant was found civilly liable for defamation of a professional judge in connection with two articles which he had written. In both publications

he alleged that the judge had acquired a new flat without surrendering the old one and then applied for retirement fearing an official investigation. The applicant implied that the judge had acted fraudulently and unlawfully and that the scheme had only been successful because of her official position.

The Court reiterates that in a democratic society individuals are entitled to comment on and criticise the administration of justice and the officials involved in it. While it is frequently necessary to protect members of the judiciary against serious and unfounded attacks, it is also true that their conduct, even outside the courtroom and especially when they avail themselves of their official position, may be a legitimate matter of concern for the press and represents an important element in discussions on the functioning of the justice system and the ethical standards expected of those who have been appointed its guardians (see *Sabou and Pircalab v. Romania*, no. 46572/99, 28 September 2004, § 38). The publications in the instant case presented an account of the events in such a way that readers were inevitably given the impression that Judge S. had abused her office and bent the law for her personal gain and unjust enrichment. The headline of the first article also alluded to the criminal nature of Judge S.'s deeds.

The allegations emanated from the applicant himself: he did not quote from another source or merely repeat statements made by others. In this respect the Court reiterates that Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to coverage of matters of serious public concern. By the terms of paragraph 2 of the Article the exercise of this freedom carries with it "duties and responsibilities", which are liable to assume significance when, as in the present case, there is a question of attacking the reputation of a named individual (see *Chernysheva v. Russia* (dec.), no. 77062/01, 10 June 2004).

The Court is not persuaded by the applicant's contention that the publications at issue contained only value judgments. The allegations that Judge S. failed to surrender her old flat to the council, that she had privatised and sold it and that a visit of a high-ranking inspector brought about her retirement were undeniably statements of fact; the truthfulness of these allegations could have been proven by appropriate evidence. However, at no stage of the proceedings – either before the domestic authorities or before this Court – did the applicant make an attempt to produce such evidence or to show the existence of a factual basis for the allegations.

Furthermore, the Court is prepared to assume that the statements about selective application of the laws in the Volgograd Region and the headline of the second article were value judgments rather than allegations of fact. However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value

judgment without any factual basis to support it may be excessive (see *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II). As it has been noted above, such a factual basis was conspicuously lacking.

The domestic courts found, after having examined all the available evidence, that the impugned statements were untrue and that the applicant failed to discharge the burden of proof which rested on him. There is no information before the Court which would indicate that these findings were contrary to the facts of the case or otherwise arbitrary. The Court is satisfied that the reasons for the interference given by the domestic courts were relevant and sufficient.

The applicant's accusations of abuse of office were of a serious nature and made repeatedly. They were capable of insulting Judge S., of affecting her in the performance of her duties and also of damaging her reputation. There is nothing to suggest that the applicant was prevented from carrying out adequate research in support of his accusations or from presenting a more balanced account of the situation. Viewed against this background and having regard to the above conclusion on the lack of any factual basis, the Court considers that the applicant's statements were not a fair comment on the administration of justice but rather a gratuitous personal attack on the professional reputation of Judge S. There was therefore a pressing social need to prevent the careless use of such grave allegations (see *Chernysheva*, cited above).

Finally, the Court finds that, in these circumstances, the award of approximately EUR 400 made by the domestic courts against the applicant does not appear disproportionate to the damage caused to the reputation of Judge S.

In view of the above considerations and having regard to the margin of appreciation afforded to the national authorities, the Court finds that the interference complained of was necessary in a democratic society to protect the reputation or rights of others within the meaning of Article 10 § 2.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. The applicant complained under Article 6 of the Convention that the outcome of the defamation action had been predetermined because his articles had been labelled "clearly libellous" by the Judges' Council and because Judge S. was a member of the Regional Court. Article 6 provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law..."

The Government submit that the letter of the Judges' Council concerned the matters unrelated to the merits of the defamation action against the applicant. In particular, it outlined ethical transgressions committed by the applicant. Furthermore, there is no reason to assume that the court which heard the defamation claim was not independent and impartial.

The applicant maintains that the domestic courts were partial.

(a) As regards the alleged impact of the Council's letter on the outcome of the defamation action, the Court notes that it was open to the applicant to raise this matter in his statement of appeal so as to give the appeal court an opportunity to examine this allegation and put the matters right, if necessary. However, it does not appear from the summary of the applicant's points of appeal given in the appeal court's judgment that the applicant mentioned this issue. The applicant thus failed to use the appropriate domestic remedy available to him.

It follows that this part of the complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

(b) As regards the proceedings before the appeal court, the Court notes that Judge S. was not in the formation that considered the appeal. Nor is there any reason to believe that she exercised any pressure whatsoever on her colleagues. The applicant did not furnish any document or statement corroborating his allegation of the courts' partiality.

It follows that this part of the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren NIELSEN
Registrar

Christos ROZAKIS
President