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. 8237/03
by Yana PORUBOVA
against Russia

The European Court of Human Rights (First Section), sitting on 9 December 2004 as a Chamber composed of:

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

Having regard to the above application lodged on 10 February 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, Ms Yana Vladimirovna Porubova, is a Russian national, who was born in 1970 and lives in Yekaterinburg. The applicant is a journalist and the editor-in-chief of the *"D.S.P."* newspaper ("*For the Service Use Only*"). 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. Publications in September 2001

In late September 2001 the applicant's newspaper published in the same issue several materials concerning a large-scale misappropriation of budgetary funds allegedly committed by Mr V., the Chairman of the Sverdlovsk Regional Government, for the benefit of Mr K., an employee of the Moscow representative office of the Sverdlovsk Region. The first article appeared under the headline "Gay scandal in the 'White House'" ("*Гей-скандал в «Белом доме»*"). The relevant extracts read as follows:

> "Once upon a time there lived the Chairman of the Sverdlovsk Region Government Mr V. He had everything: he had his position, high esteem and respect. And also he enjoyed the governor's love.
>
> But V. fell in love... not with the governor and not with his work, but with a twenty-five year-old employee of the region's representative office in Moscow, Mr K.
>
> How does one become a homosexual? Where does this "love" come from?
>
> We are simple and unsophisticated persons... And we cannot conjure up the scene that happened between them in the sumptuous palace of the region's representative office in Moscow... Rumours have it that the governor, on having learnt of certain details, was furious... and even fired K. from his position.
>
> But love, as we know, can overcome any obstacle. It finds not only a time, but also a place."

The article then asserted that, further to an order signed by V. in 1997, a State-owned company had extinguished its outstanding tax liability to the regional budget by purchasing a three-room apartment in Moscow:

> "At first the flat was even entered into the government's balance sheet. However, after a while V. offered the flat... No, please do not think that he offered it to Mr K... [He offered it] to Mr K.'s father. Apparently, as a 'thank-you' for the upbringing of his son..."

On the same page the newspaper printed a copy of a letter from the head of the Sverdlovsk regional police department to the chairman of the Sverdlovsk regional audit chamber. The police head described the mechanism of extinguishing tax liabilities by way of acquiring a flat in Moscow and requested that an audit of the companies involved and the Sverdlovsk Regional Government should be carried out.

The third publication on the same page under the headline "Story of the flat on Orshanskaya [street]. Step-by-step strategy for beginner embezzlers of public funds" ("*История квартирки на Оршанской. Пошаговая*

стратегия для начинающих казнокрадов") described, in chronological order, financial transactions between V., K., State authorities and private companies in connection with the flat in question.

2. Criminal charges against the applicant

On 12 October 2001 the prosecutor's office of the Sverdlovsk Region granted requests by V. and K. and initiated criminal proceedings against the applicant for libel and insult disseminated in mass-media under Articles 129 § 2 and 130 § 2 of the Criminal Code.

On 23 October and 8 November 2001 V. and K., respectively, brought civil defamation actions against the applicant claiming compensation for non-pecuniary damage.

The investigator commissioned a linguistic and cultural expert examination of the publications in question. On 6 November 2001 the expert came to the conclusion that the publications contained allegations about homosexuality of V. and K. and about their having engaged in sexual intercourse in the representative office of the Sverdlovsk Region. The expert considered that the articles purported to present a negative image of V.:

> "Tolerance towards customs and morals of others is, in general, uncharacteristic of Russian mentality, which is also evident in the attitude towards 'sexual minorities'. The Russian popular mindset and the Russian language retain strictly negative, rude and discourteous attitude to people of non-traditional sexual orientation (homosexuals and lesbians)."

The expert noted that the author of the first publication had "a preference for emotional value-judgments". The report concluded:

> "In this context the information on the sale-purchase of a flat in Moscow at the expense of the budget becomes sensational and it suggests the reader to view V. as a dishonest manager, embezzler of public funds, and, in addition, an immoral person longing for sensual pleasures and corporal sexual attraction, voluptuous and lustful. The pragmatic function of the articles... is to undermine [readers'] trust in V. and K. as politicians..."

In late November 2001 the applicant's lawyer privately commissioned a linguistic expert examination of the publications. The expert came to the conclusion that the word "homosexual" had no negative connotations and, therefore, could not be held to damage or degrade honour and dignity of others. He noted that the Russian society in the recent years had become more tolerant towards homosexuality and a disclosure of someone's homosexuality in mass-media was not necessarily damaging to his reputation. The applicant's lawyer requested the investigator to admit this report in evidence, but her request was refused on the ground that the expert had been a linguist and not a specialist in culture studies and thus had not been competent to perform the examination.

On 29 and 30 November 2001 the applicant was charged with libel and insult disseminated in mass-media.

Following indictment, the applicant and her lawyer filed a number of requests. They pointed out that the indictment did not specify which information in the publication had been untrue, while the scope of the investigation had been limited to the allegations about V.'s homosexuality. On this ground they requested that the investigation should address the issue of misappropriation of budgetary funds, interview V. and K. about this matter and examine the relevant documents. Alternatively, if the charges were to be based exclusively on the allegations about V.'s and K.'s homosexuality, the applicant requested that a medical examination of V. and K. should be carried out in order to establish their sexual orientation. Finally, the applicant's lawyer requested that the investigation be transferred to a different region in order to ensure its independence and impartiality.

On 3 and 28 December 2001 the investigator refused all requests. He replied in general terms that the investigation was complete and no further interviews or expert reports were necessary.

On 28 December 2001 the final bill of indictment was served on the applicant and the case was referred for trial. The applicant was charged with criminal libel and insult in connection of her having disseminated the information that "V. and K. are homosexuals and lovers who engaged in a homosexual act in the palace of the region's representative office in Moscow". The charges did not touch upon the allegations of misappropriation of budgetary funds.

3. Criminal conviction of the applicant

The applicant applied for a public hearing of her case, but her request was refused on an unspecified date and the trial was held *in camera*.

The applicant pleaded not guilty. She claimed that she was convinced of the accuracy of the information on K.'s homosexuality because she knew him in person. She also requested to adduce in evidence certain material containing witnesses' statements about a same-sex relationship between V. and K.; the court refused this request.

The court examined the witnesses who testified that the applicant had been in charge of drafting the publications, publishing and distributing the newspaper.

The plaintiffs V. and K. withdrew their civil claims against the applicant and offered her a friendly settlement, which she refused.

On 22 April 2002 the Verkh-Issetskiy District Court of Yekaterinburg (*Верх-Исетский районный суд г. Екатеринбурга*) delivered a judgment in the applicant's case. The court did not discuss whether the information on V.'s and K.'s homosexuality was true or false; relying on V.'s and K.'s statements that the publications in question had been damaging to them as politicians and public servants and on the conclusions of the linguistic expert examination of 6 November 2001, it found as follows:

> "Indeed, it has been established indisputably that the editor-in-chief of the *D.S.P.* newspaper Ya. V. Porubova deliberately published... [the contested articles] which she had drafted. In these articles she stated that the Chairman of the Sverdlovsk Regional Government Mr V. and a member of the House of representatives of the Legislative Assembly of the Sverdlovsk Region K. were homosexual lovers who had engaged in homosexual intercourse in Moscow in the palace of the representative office of the Sverdlovsk Region, that is she disseminated information which had only been based on her insinuation and which she had known to be untrue and defamatory in respect of the victims. Purporting to slander the victims, she arranged for the printing of 500,000 copies of the newspaper and distributed them in the Sverdlovsk Region. The investigative authorities correctly characterised her actions as libel under Article 129 § 2 of the Criminal Code, i.e. dissemination in the mass-media of the information known to be untrue and damaging to other persons' honour, dignity and reputation.
>
> In addition, Mrs Porubova related in these articles untrue information that [V. and K.] were homosexual lovers who had engaged in homosexual intercourse in Moscow in the palace of the representative office of the Sverdlovsk Region, that is she deliberately appraised the personal qualities and conduct of the victims [in the terms] that grossly degraded their human dignity and contradicted the approaches to the treatment of persons prevailing in the society. Such treatment of the victims must be considered obscene and damaging to their dignity. In order to make the first issue of the newspaper pseudo-important and sensational, she degraded the honour and dignity of the victims in the mass-media. Therefore, the investigative authorities correctly characterised her actions as an offence under Article 130 § 2 of the Criminal Code."

The applicant was found guilty as charged and sentenced to one and a half years' correctional works with retention of 15 percent of her wage for the benefit of the State.

On 4 September 2002 the Criminal Section of the Sverdlovsk Regional Court upheld the conviction, endorsing the reasons of the trial court.

Subsequently the applicant was relieved from serving her sentence on the basis of an amnesty act in respect of women and minors passed by the Russian legislature on 30 November 2001.

B. Relevant domestic law

Constitution of the Russian Federation

Article 29 of the Constitution of the Russian Federation guarantees freedom of ideas and expression, as well as freedom of the mass media.

Criminal Code of the Russian Federation

Article 129 § 2 of the Criminal Code of the Russian Federation provides that libel disseminated in a public statement, publicly displayed work of art or in mass-media shall be punished by a fine and/or correctional works for a period of up to two years. Libel is defined in Article 129 § 1 as dissemination of the information known to be untrue and damaging to honour and dignity of the victim or undermining the victim's reputation.

Article 130 § 2 of the Criminal Code of the Russian Federation provides that an insult disseminated in a public statement, publicly displayed work of art or in mass-media shall be punished by a fine and/or correctional works for a period of up to one year. An insult is defined in Article 130 § 1 as degradation of honour and dignity of the victim conveyed in an obscene form.

Code of Criminal Procedure (in force at the material time)

Article 18. Public nature of judicial proceedings

"Examination of cases in all courts shall be public, save for cases where public examination may harm the interests of the protection of State secrets.

In addition, judicial proceedings *in camera* may be conducted – on the basis of a reasoned decision of the court or a judge – in the cases concerning criminal offences committed by persons under the age of sixteen or sex-related criminal offences, as well in other cases in order to prevent divulging of information on intimate aspects of the lives of the case participants..."

COMPLAINTS

The applicant complains under Article 6 § 1 of the Convention that the proceedings against her were unfair, that the trial was conducted *in camera* and that the trial and appeal courts were dependent on the victim V. who, by virtue of his position, was in charge of all logistical arrangements for the courts in the region.

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

The applicant complains under Article 13 of the Convention that, as a result of her conviction, she does not have any effective remedy for alleged violations of her rights.

THE LAW

1. The applicant complained under Article 6 § 1 of the Convention about unfair trial, about the lack of independence of the regional courts which had been financially and logistically dependent on the victim, and about the holding of the trial in a closed session. Article 6 § 1 provides as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of

the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require..."

(a) Insofar as the applicant complained about the lack of independence of the trial and appeal courts, the Government have submitted that, pursuant to Article 124 of the Russian Constitution and section 33 of the Federal Constitutional Law "on Judicial System of the Russian Federation", all domestic courts are funded from the federal budget. In each annual budget, funds are specifically allocated for the financing of the Constitutional Court, the Supreme Court and other federal courts. The trial court was not therefore financially dependent on the regional government.

The applicant has contended in reply that before the opening of her trial, the wife of the trial judge was promoted to the regional court and that upon her conviction, the trial court received new furniture and office equipment. She has admitted, however, that these events might have been a coincidence.

The Court recalls that, in order to determine whether a tribunal can be considered to be "independent" of one of the parties to a case, regard must be had to the manner of appointment of its members, the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (see, *inter alia*, *Campbell & Fell v. The United Kingdom*, judgment of 28 June 1984, Series A no. 80, § 78).

In the present case the applicant's concerns regarding the courts' independence stemmed from the fact that the head of the regional government who was allegedly in charge of the courts' material procurement had had an interest in the outcome of the trial. However, as the Government have submitted, and this has not been called in question by the applicant, the Russian courts at all levels of jurisdiction are funded directly from the federal budget and the Judicial Department of the Russian Federation is a special procurement agency in charge of all supplies for the courts' needs. The regional executive authorities do not allocate funds or provide otherwise for the courts' functioning and therefore the applicant's apprehensions in this regard cannot be held to be objectively justified.

As regards the specific allegations raised by the applicant concerning the acquisition of new furniture for the district court, the applicant has failed to show any link, beyond a mere temporal correlation, between her trial and the refurbishment of the court. It would be a logical fallacy to assume, in the absence of any other indication, that if the furniture was purchased in the wake of the trial, it was offered in recompense for the applicant's conviction. Nor is there any obvious connection between the applicant's trial and the trial judge's wife's nomination to the regional court which had preceded it.

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.

(b) The applicant also complained that the trial had not been "fair and public".

The Government rely on Article 18 of the then effective Code of Criminal Procedure which permitted closed court sessions if it was necessary to avert divulging of information on intimate aspects of the life of the trial participants.

The applicant submits that the trial court did not comply with Article 18 because it did not issue a reasoned decision to hold the trial in a closed session.

The Court observes that the Government have not provided a copy of the judicial decision authorising the conduct of the proceedings in private. It considers therefore that this part of the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant alleged a violation of 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...
>
> 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 applicant failed in her journalistic duty to verify accuracy of the published information and to obtain consent of the person concerned for dissemination of information about his private life, such duty being established in section 49 of the law on mass-media of 27 December 1991. The domestic courts correctly determined that the applicant had published facts, without verifying them, whereby she slandered the victims and impaired their honour and dignity.

The applicant responds that it has not been conclusively proven that she had been the author of the publication in question or that she had arranged for the printing of the newspaper. Furthermore, the courts did not establish that the information contained in the articles had been false or insulting. In particular, the courts rejected the following requests: to examine a report by

the audit commission showing the facts of embezzlement, to interview K.'s former spouse, to carry out a medical examination of the victims, and to examine the material showing the existence of a homosexual relationship between the victims.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

3. The applicant complained under Article 13 of the Convention that the conviction had *de facto* denied her effective remedies for violations of her rights. Article 13 provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Insofar as the applicant's complaint may be understood as a complaint about the impossibility to make a further appeal against the conviction, the Court finds that Article 13 does not require the States to provide for an opportunity to appeal against a final judgment if the applicant is merely dissatisfied with the outcome of the proceedings. Furthermore, in so far as the applicant claims that the outcome of the proceedings in Russia was incompatible with Article 10 of the Convention, the proper venue of redress for her would have been to pursue an application to Strasbourg against Russia (see *Odd F. Lindberg v. Sweden* (dec.), no. 48198/99, 15 January 2004), which she has in fact done without any apparent hindrance on the part of the Government.

It follows that this 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 admissible, without prejudging the merits, the applicant's complaints about the fairness and publicity of the trial and about an alleged violation of her right to freedom of expression;

Declares inadmissible the remainder of the application.

Søren NIELSEN
Registrar

Christos ROZAKIS
President