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. 35016/03
by Kakhraman Umanovich SALIYEV
against Russia

The European Court of Human Rights (First Section), sitting on 27 September 2007 as a Chamber composed of:

Mr C.L. ROZAKIS, *President,*
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS,
Mr G. MALINVERNI, *judges,*
and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application lodged on 20 October 2003,

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

Having regards to the additional information provided by the parties in reply to the Court's request,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Kakhraman Umanovich Saliyev, is a Russian national who was born in 1957 and lives in Magadan. He was represented before the Court by Mr M. Maksimyuk, a lawyer practising in Magadan. The Russian Government ("the Government") were represented by Mr P. Laptev, the

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. Withdrawal of the newspaper

The applicant was the president of a non-governmental organisation, "Investors of Kolyma". In 2001 he wrote an article entitled "Shares for the Moor of Moscow" (*Акции для московского мавра*). The article was about the acquisition of shares in "Kolymaenergo" Plc (a local energy-producing company) by a group of Moscow-based firms. In the article the applicant described this purchase as a crooked deal and alleged that a high-level official from Moscow, one of the leaders of the pro-government political party, was behind the transaction.

On 10 October 2001 the applicant submitted the article to a municipally-owned newspaper, *Vecherniy Magadan*, for publication. He produced documents confirming the facts described in the article. The editor-in-chief of the newspaper agreed to publish the article for a fee. It was included in issue no. 44 of 2 November 2001. That issue, with the applicant's article in it, was printed in 5,184 copies.

In the morning of 2 November 2001 the issue containing the applicant's article was sent to subscribers, and to State libraries. 2,000 copies were given to the distributing company, Rospechat, to be sold at street distribution points, kiosks and newsstands. However, shortly afterwards those copies were withdrawn from the newsstands and later destroyed. Only the copies that had been sent to the libraries and subscribers remained.

On 5 November 2001 the editor-in-chief wrote a letter to the Mayor of Magadan. In that letter he asked the Mayor to release him from the position of editor-in-chief because he "was unable to perform his duties in a fully professional manner".

On 10 November 2001 the head of the trade union Kolymaenergo wrote a letter to the editor-in-chief of *Vecherniy Magadan* asking him to explain why issue no. 44 had been withdrawn from the newsstands. On 11 November 2001 the editor-in-chief replied to that letter explaining that he had not given that order. In his words, that decision had been taken by the head of the distributing company Rospechat. The editor-in-chief had had to sign a backdated order for withdrawal of the copies, and from a private conversation he had understood that the copies had been withdrawn because of the applicant's article, which had mentioned the names of certain

politicians whom he described as "untouchable". After that incident he "took the difficult decision to resign from the position of editor-in-chief of *Vecherniy Magadan*", because, in his words, "the newspaper was unable to benefit from the freedom of speech and of the press," and he "did not want to deceive readers". It appears that soon afterwards the editor-in-chief left *Vecherniy Magadan* and started working as a journalist for a private newspaper.

In the following months the applicant tried to publish the article in several regional and central newspapers, but to no avail.

2. Criminal investigation

On an unspecified date in 2002 the applicant lodged a formal complaint with the Prosecutor's Office of the Magadan Region concerning the withdrawal of the copies. In his submission, the withdrawal amounted to an unlawful interference with the freedom of press – a criminal offence under Article 144 of the Criminal Code.

On 22 January 2003 that complaint was transmitted to the Prosecutor's Office of Magadan town. The case was assigned to an investigator, who questioned the head of Rospechat and the former editor-in-chief.

The head of Rospechat testified that the decision to withdraw the copies had been taken by the former editor-in-chief, who confirmed that. The latter also explained that he had agreed to publish the article because it had concerned an interesting subject and because the applicant had shown him documents which confirmed the facts described in the article. The editor-in-chief had thought that the article would raise public interest and had decided to publish it. However, after careful consideration, when the newspaper had already been printed and sent out for distribution, he had decided to withdraw it. He had understood that the editorial staff "would have had problems" if the article had been published. As to his letter of 11 November 2001, it had not been accurate, because at the time he had been upset over his own decision to resign from the post.

On 31 January 2003, after a preliminary inquiry, the investigator decided not to open a criminal investigation. The investigator found that the decision to withdraw the copies had been taken by the editor-in-chief himself, without any coercion. The investigator noted, however, that the decision of the editor-in-chief to withdraw the copies had been motivated by the need to avoid lawsuits and litigation, which might have followed the publication of the article, and to protect the editorial staff. The investigator concluded that no interference with the freedom of the press had occurred.

The applicant challenged that decision before the court. On 7 April 2003 the Magadan Town Court examined the materials of the case, heard the applicant and the former editor-in-chief who testified that he had signed the order to withdraw the copies after they had already been withdrawn from sale. After having examined the applicant's complaint, the Town Court

decided to quash the decision of 31 January 2003. The court noted that by law the withdrawal of a print run could be ordered only by the judicial authorities. The Town Court also ordered certain additional investigative measures to be carried out by the investigative authorities.

On 23 April 2003 the Magadan Town Prosecutor ordered an additional inquiry. The case was assigned to another investigator who questioned the applicant, the former editor-in-chief, the head of Rospechat, and a staff member of Rospechat. The applicant testified that when he had learned about the withdrawal of the copies he had called the editor-in-chief who had explained that they had been withdrawn by a decision of Rospechat, and that the head of Rospechat had persuaded him to sign a backdated order for withdrawal.

The head of Rospechat testified that the copies had been withdrawn by the order of the then editor-in-chief. He also denied putting any pressure on the editor-in-chief.

The former editor-in-chief confirmed his previous testimony given to the investigator of the Town Prosecutor's Office. As to his testimony before the Town Court, it was his view that the copies had been withdrawn before the order had been signed. Indeed, he had discovered at one of the street kiosks that all copies of issue no. 44 had disappeared. However, he had no proof that they had disappeared because they had been withdrawn.

Finally, the staff member of Rospechat confirmed that on an unspecified date she had helped the then editor-in-chief of *Vecherniy Magadan* to withdraw the copies from the street kiosks. On the whole, they had managed to withdraw 100 to 200 copies.

On 3 May 2003 the investigator concluded that there was no case to investigate. His reasoning was similar to the reasoning of the former investigator of 31 January 2003.

The applicant challenged that decision before the court. On 20 May 2003 the Magadan Town Court decided to uphold the decision of 3 May 2003. The court concluded that the prosecution inquiry had been carried out with due diligence, and that the findings of the inquiry were properly reasoned. The applicant appealed, but on 25 June 2003 the Magadan Regional Court upheld the judgment of 20 May 2003.

3. Civil proceedings

The applicant brought court proceedings seeking to have 2000 copies of issue no. 44 including his article reprinted and sold at the street kiosks.

On 1 July 2003 the Magadan Town Court dismissed his action. The court stated that the newspaper, as the owner of the print run, could dispose of the copies of its own free will. The court also found that there was no contract between the applicant and the newspaper obliging the latter to distribute the newspaper containing the article.

The applicant appealed. On 5 August 2003 the Magadan Regional Court upheld the lower court's decision repeating the reasoning of the latter.

B. Relevant domestic law

1. *The Media Act*

The Media Act of 27 December 1991, with further amendments, prohibits censorship: State bodies and officials cannot require a medium (i.e. a newspaper) to obtain prior authorisation for the publication of material. The Act also prohibits banning the distribution of certain material (section 3 of the Act).

Under section 2 (10) of the Act the editor-in-chief is the person who heads the editorial board and "takes final decisions as to the production and the release of the medium".

A medium may be established by a State body. The owner of the medium may interfere with the editorial policy only to the extent that is defined in the charter of that medium (sections 18 and 19 of the Act).

Under section 25 of the Act, non-subscription sales of a newspaper (for example, sales from newsstands on the streets) may be limited only to the extent defined by the Act.

Under section 28 of the Act confiscation or destruction of a print run (*тираж*) or part of it is possible only pursuant to a court decision (to this end] which has entered into legal force.

Under section 42 of the Act, subject to any contrary legal provision, nobody can compel the editorial board to publish material which has been rejected by that board.

2. *Status of* Vecherniy Magadan

According to the charter of the newspaper, *Vecherniy Magadan* was created by the Committee on Municipal Property of the municipality of Magadan ("the municipality") in the form of a "municipal institution" (*муниципальное учреждение*) with a view to informing the population of Magadan about social, political and cultural life in the town. The municipality retains the ownership rights in respect of the assets of the newspaper, whereas the newspaper exercises the right of "operative management" (*право оперативного управления*) in respect of those assets. The municipality approves the budget of the newspaper and payroll expenses. The newspaper receives funding from the municipal budget; it can also receive income from other sources, such as advertising, subscription fees, and so on.

The municipality can "define targets" for the development of the newspaper. The newspaper has an "editorial council" (*редакционный*

совет), a "coordinative and advisory body" composed of the editor-in-chief and several representatives of the municipality.

The editorial policy of the newspaper is defined by the "editorial board" (*редакционная коллегия*), composed of the editor-in-chief, his deputy, the secretary, and the heads of departments. The editorial board can propose materials for publishing or recommend not to publish "controversial material".

The editor-in-chief of the newspaper is appointed by the municipality. The editor-in-chief appoints the other staff members of the newspaper and acts on behalf of the newspaper before third persons. The municipality cannot compel the newspaper to publish material if it has been rejected by the editorial board, unless the law provides otherwise or the material is of an official nature. The charter of the newspaper does not stipulate, however, who can decide to withdraw/destroy copies of the newspaper or the grounds for doing so.

COMPLAINT

Under Article 10 of the Convention the applicant complained about the withdrawal of the copies of the issue containing his article, which he claimed was an act of political censorship and a violation of his right to freedom of expression. He also referred to Article 9 of the Convention in this connection.

THE LAW

The applicant complained about the withdrawal of the copies of the newspaper containing his article. He referred to Articles 9 and 10 of the Convention. The Court considers that this complaint falls to be examined under Article 10, 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 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. The Government's submissions

The Government submitted that the print run belonged to the newspaper. Therefore, as an independent legal entity and a market player the newspaper had the right to dispose of its property as it deemed appropriate. The newspaper had never made a commitment to the applicant to print or distribute a specific number of copies of issue no. 44 containing the applicant's article. Therefore, the applicant's rights had not been affected.

Further, the Government claimed that under the Media Act nobody could oblige a newspaper to publish an article. They referred to section 42 of that Act (cited above in "Relevant domestic law") which provided that the editorial board could refuse to publish material. Such a decision could be taken by the editor-in-chief by virtue of section 2 of the Act. As regards section 28, referred to by the applicant, it concerned the case of confiscation of a print run, but not the voluntary withdrawal of it by the owner.

B. The applicant's submissions

The applicant maintained that the copies had been withdrawn for political reasons. The newspaper belonged to the municipality of Magadan and thus was under the control of the public authorities. The article in issue concerned a financial deal involving an influential politician, namely the leader of the pro-government party in the lower chamber of the federal Parliament. It was unclear who had decided to withdraw the copies and when it had happened. Since it had been an act of political censorship, the revocation of the copies could not be regarded as "voluntary withdrawal", as the Government suggested. Russian law prohibited confiscation of the print run or its destruction without prior court authorisation. Therefore, the withdrawal had been unlawful.

Furthermore, it was true that there had been no agreement between the applicant and the editorial board as to the number of copies of issue no. 44 to be printed. However, the number of printed copies was indicated in each issue of the newspaper. That could have been regarded as a "public offer" by which the editorial board was bound.

Finally, a newspaper was not just an article of sale: an editor could not just withdraw the newspaper from newsstands in the same manner as a manufacturer withdrew defective goods from the shops. A newspaper was an instrument for conveying information of public interest and in this capacity it was protected by Article 10. Limitation on freedom of expression was permissible only on the grounds listed in the second paragraph of Article 10. However, none of them had existed at the time of the withdrawal in question.

C. The Court's assessment

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.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits.

Søren NIELSEN
Registrar

Christos ROZAKIS
President