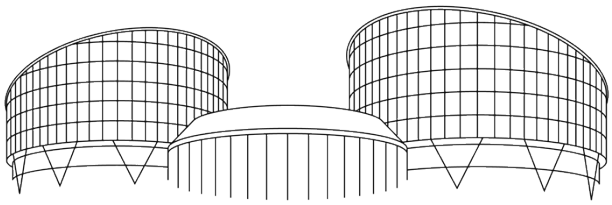

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF NOVAYA GAZETA AND BORODYANSKIY v. RUSSIA

(Application no. 14087/08)

JUDGMENT

STRASBOURG

28 March 2013

FINAL

28/06/2013

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

In the case of Novaya Gazeta and Borodyanskiy v. Russia,

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

Isabelle Berro-Lefèvre, *President,*
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 5 March 2013,

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

PROCEDURE

1. The case originated in an application (no. 14087/08) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the editorial and publishing house Novaya Gazeta, a non-governmental organisation registered under Russian law, and a Russian national, Mr G. Borodyanskiy, ("the applicants") on 21 January 2008.

2. The applicants were represented by Mr Ya. Kozheurov, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by Mr G. Matyushkin, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicants alleged, in particular, that the libel proceedings against them constituted a violation of freedom of expression.

4. On 18 January 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant, Novaya Gazeta Editorial and Publishing House, is an autonomous non-governmental organisation registered under Russian law in Moscow on 24 June 1998. It edits and publishes a daily national

newspaper with circulation of 500,000 copies under the name *Novaya Gazeta*.

6. The second applicant, Mr G. Borodyanskiy, was born in 1959 and lives in Omsk. He is one of the regional journalists of *Novaya Gazeta* in Omsk, Tomsk, and Tyumen Regions.

7. In 2006 *Novaya Gazeta* published a series of articles by the second applicant.

8. On 27 November 2006 the newspaper published in both its printed and online versions an article by the second applicant entitled 'Personalities received loans' *(«Кредиты выдали под лица»)* ("the article"). It concerned alleged irregularities in the issuance of large unpaid loans by Sberbank (Savings Bank). The text described several fraudulent schemes which were used to obtain up to 147,000,000 euros (EUR) in loans from Sberbank, and listed certain individuals allegedly involved in these schemes. Among others the article mentioned Mr R.M., a politician and businessman from Kazakhstan with significant business interests in agricultural production in Omsk Region. A brief update on the criminal inquiry into the alleged loan fraud concluded the article.

9. The article contained, in particular, the following four fragments:

> "[1] In this case the interests of an important politician – the President of the Agrarian Party of Kazakhstan, which is the second most influential party [in that country] after the Otan Party headed by Mr Nazarbayev [the President of Kazakhstan], [Mr R.M.], were involved.
>
> [2] In Omsk [Mr R.M.] controls the Kirovskiy Grain Elevator, the biggest flour producer in the Omsk Region, [limited liability company] M, a bread factory and dozens of successful enterprises.
>
> [3] It would be inconceivable for anyone to achieve such success in our region without the benevolence (*благоволение*) of the Governor [Mr P.] who has held senior public office in Kazakhstan for more than twenty years. And this biographical fact of [Mr P.], naturally, has linked the republic [of Kazakhstan] and the [Omsk] region ever closer with 'fraternal bonds'.
>
> [4] The Kirovskiy Grain Elevator sent forged certificates to Sberbank confirming that different companies [had] grain which actually never existed. Those certificates were issued by its CEO, Ms Zh. According to the investigators, each certificate cost fifty to seventy thousand roubles. Loans were given on the basis of those certificates in the amount of half a billion roubles."

10. On 11 December 2006 Mr P., the Governor of Omsk Region, lodged a libel action against the first and second applicants with the Kuybyshevskiy District Court of Omsk (the District Court). He sought recognition of statements about him as libellous, publication of a rectification in *Novaya Gazeta*, and 500,000 Russian roubles (RUB) in non-pecuniary damages.

11. The court proceedings started on 20 December 2006.

12. On 26 December 2006 the applicants were notified about the next hearing on 11 January 2007, which was subsequently adjourned to 15 January 2007. The applicants were notified of the change of date.

13. On 14 January 2007 the first applicant requested the trial court to adjourn the hearing by three more weeks in order to prepare its written comments on the lawsuit.

14. On 15 January 2007 the District Court refused to further adjourn the hearing, because the applicant newspaper did not advance any reasons why its representative could not appear for the hearing and why it did not submit its written comments on the lawsuit between 20 December 2006 and 15 January 2007.

15. The trial court held a hearing in the defendants' absence and allowed Mr P.'s action in part. The relevant part of the judgment read as follows:

> "... In accordance with Article 23 of the Constitution protection of every citizen's good name is guaranteed.
>
> Under Article 152 of the Civil Code an individual may apply to a court with a request for rectification of statements that are damaging to his honour, dignity or professional reputation if the person who disseminated such statements can not prove their truthfulness ..."

The trial court also established that the statements about Mr P. (reproduced above in paragraph 9) were disseminated by the applicants in printed and online versions of *Novaya Gazeta*, and thus became known to an indeterminate number of readers. It continued:

> "... In consideration of defamation disputes the following must be established: whether the defendant had disseminated statements about the plaintiff, whether those statements were discrediting, and whether those statements were false.
>
> The statements about the plaintiff had been disseminated ..."
>
> The defendants did not present any evidence that Mr P. had engaged in activities aimed at providing certain businessmen and commercial organisations with privileges, or that he had in fact abused his powers to further certain individuals' interests ...
>
> The author of the article referred to benevolence (*благоволение*) on the part of the Governor towards a renowned politician, the President of the Agrarian Party of Kazakhstan, [Mr R.M.]
>
> "Benevolence" is to be understood as good will, a favourable attitude, approval, expression of satisfaction, and gratitude ...
>
> The statement that "in our region ... the Governor", by using his office, shows benevolence [or] approval of the actions of [Mr R.M.] in 'control of the Kirovskiy Grain Elevator', is not compatible with the office of a state official. These statements, taken in conjunction with other paragraphs of the article (about [Mr R.M.], about issuance of false certificates to procure loans), create a negative image of the plaintiff, and could generate scepticism as to the plaintiff's compliance with the ethical principles expected of the head of the executive authority in the region ... [T]hese

> statements characterise the plaintiff's actions as aimed at providing certain businessmen and commercial organisations with privileges, and as an abuse of his powers to further the interests of certain individuals ..."

The trial court concluded that the statements were defamatory, and that rectification of the disseminated statements must be published in printed and online versions of *Novaya Gazeta*. It further stated:

> "... When determining the level of non-pecuniary damages the court considers the degree of distress caused to the plaintiff by the extent of the dissemination of false statements. The newspaper is distributed in nine regions of Russia and in two foreign countries. The article was also published on line ... [on a website] with at least 91,369 readers weekly ... Having regard to these circumstances, the court orders the defendants to pay RUB 60,000 [in compensation] ..."

It addition to RUB 60,000 (EUR 1,623) in non-pecuniary damages the plaintiff was also awarded RUB 100 (EUR 2.5) in court fees, to be paid by the applicants jointly.

16. On 9 March 2007 the first applicant appealed, claiming, in particular, that the article contained value judgments not susceptible of proof and that the District Court had failed to duly notify it of the date and time of the hearing. According to the heading of the appeal statement, the second applicant was a co-defendant.

17. On 25 July 2007 the Omsk Regional Court, in the presence of the parties to the proceedings and hearing their statements, upheld the lower court's judgment. It reasoned that the District Court had correctly concluded that the information in the article had tarnished the plaintiff's reputation, and dismissed the first applicant's description of it as a value judgment. The relevant part of the judgment read as follows:

> "The following claims in the defendants' appeal are not justified: that the statements are not discrediting, that they may not be regarded as assertions, and that they are merely opinions, value judgments by the author and thus not susceptible of proof.
>
> The [trial] court rightly noted that the author of the article, by claiming that the Governor has "benevolence" towards [Mr. R.M.], alleged approval of [his] control over the Kirovskiy Grain Elevator ..."

At the same time the Regional Court ruled that the statement in paragraph 4 of the article reproduced above was not defamatory, as it did not refer to any abuse of powers by Mr P. Further, it dismissed the first applicant's claim that it had not been summoned to the district court hearing, stating that several notifications had in fact been sent to the defendants.

18. The Regional Court ruled in the final judgment that the first applicant was to publish a rectification of the statements contained in paragraphs 1-3 of the article reproduced above, and that the applicants were to pay Mr P. jointly RUB 60,100 in non-pecuniary damages and court fees.

19. Following this judgment, the first applicant published a rectification in the printed and online versions of *Novaya Gazeta* and paid Mr P. non-pecuniary damages and court fees.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of the Russian Federation

20. Article 23 guarantees protection of private life, privacy of personal and family affairs, good name and honour. Article 29 protects freedom of thought and expression, together with freedom of the mass media.

B. Civil Code of the Russian Federation

21. Article 152 provides that an individual may apply to a court with a request for rectification of statements (*сведения*) that are damaging to his 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. The same rules are applicable in cases where the plaintiff is a legal entity.

C. Decree of the Plenum of the Supreme Court of the Russian Federation no. 3 of 24 February 2005

22. The Supreme Court clarified to the lower courts that a defamation action may be allowed only if a defendant has disseminated statements about the plaintiff, if those statements are discrediting, and if those statements are false. It required the courts hearing defamation claims to distinguish between statements of facts, which can be checked for veracity, and evaluative judgments, opinions and convictions which are not actionable under Article 152 of the Civil Code since they are an expression of the defendant's subjective opinion and views and cannot be checked for veracity.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

23. The applicants complained that their right to freedom of expression had been violated. This complaint falls to be examined under Article 10 of the Convention, which in the relevant parts 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 ... for the protection of the reputation or rights of others ..."

A. Admissibility

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

B. Merits

1. The parties' submissions

25. The applicants submitted that the libel proceedings, the order to publish a rectification, and the award of non-pecuniary damages amounted to an interference with their freedom of expression. They maintained that the second applicant's statements about Mr P. and his "benevolence" towards certain business interests were expressions of his opinion and a value judgment, and did not suggest any breach of professional or ethical conduct on the part of Mr P. Since value judgments are not susceptible to proof, the domestic courts had erred in requiring the applicants to present evidence supporting the statements.

26. The Government did not dispute that the libel proceedings and the sanctions imposed on the applicants constituted an interference with their freedom of expression. They argued that the interference was necessitated by a pressing social need, namely the protection of the reputation and rights of others, and that the sanction imposed was proportionate. The domestic courts had complied with the requirements of Article 10 of the Convention, considered the distinction between statements of fact and value judgments,

and concluded that the statements of the second applicant were devoid of any factual basis. Referring to the Court's judgments in the cases of *Krasulya v. Russia* (no. 12365/03, 22 February 2007), and *Kudeshkina v. Russia* (no. 29492/05, 26 February 2009), the Government contended that even if the paragraphs in question were expressing a value judgment the second applicant lacked "good faith" in the exercise of his journalistic duties by failing to rely on any facts.

2. General principles

27. The Court has repeatedly stressed that the freedom of expression enshrined in Article 10 of the Convention has paramount importance as an essential foundation of a democratic society, a basic condition for its progress and the development of every person. Consequently, the Convention provisions securing this right apply 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 the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society" (see, notably, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; and, more recently, *Axel Springer AG v. Germany* [GC], no. 39954/08, § 78, 7 February 2012, and *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 48, ECHR 2012 (extracts).

28. Nevertheless, the guarantees or Article 10 of the Convention are not absolute and are subject to possible restrictions, which, however, must be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, pp. 23-24, § 31, and *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I). The primary responsibility to balance restrictions on freedom of expression rests with the competent national authorities, but it remains subject to the Court's scrutiny whether the conduct of the national authorities is compatible with their engagements under the Convention (see The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 59, Series A no. 30).

29. In cases similar to the present one the Court is mindful of the vital role of "public watchdog", which the press plays in a society based on the values and principles underlying the Convention (see *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216). It is incumbent on it to impart information and ideas of public interest and the public also has a right to receive them (see *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, § 40, ECHR 2009). In order to play a meaningful role in covering matters of public interest and importance, journalists are permitted a degree of exaggeration, provocation, and even certain immoderate statements (see *Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 34,

ECHR 2000-X, and *Mamère v. France*, no. 12697/03, § 25, ECHR 2006-XIII).

30. Further, the Court has consistently held that, in assessing whether there was a "pressing social need" capable of justifying interference with the exercise of freedom of expression, a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible to 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 *Lingens v. Austria*, 8 July 1986, § 46, Series A no. 103; *De Haes and Gijsels v. Belgium*, 24 February 1997, § 42, *Reports of Judgments and Decisions* 1997-I; and *Mahmudov and Agazade v. Azerbaidjan*, no. 35877/04, § 41, 18 December 2008). However, where allegations are made about the conduct of a third party, it may sometimes be difficult to distinguish between assertions of fact and value judgments.

3. The Court's assessment

31. The Court notes that the parties agreed that the libel proceedings, leading to the order to publish a rectification of the statements and to the award of non-pecuniary damages, constituted an interference with the applicants' rights under Article 10 of the Convention. Furthermore, it was not disputed that such interference was prescribed by law and pursued a legitimate aim of protection of Mr P's reputation.

32. Consequently, it falls to the Court to examine whether the interference was necessary in a democratic society, and, specifically, whether it was justified by any pressing social need and was proportionate to the aims pursued (see, for example, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

33. The sole existence of a legitimate aim for an interference with the freedom of expression is not sufficient to indicate the presence of a pressing social need for such interference. The values and principles underlying Article 10 of the Convention command that the national authorities shall always be guided by "relevant and sufficient reasons" (see, among other authorities, *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI, and *Fatullayev v. Azerbaijan*, no. 40984/07, § 84, 22 April 2010).

34. The article, authored by the first applicant and published by the second, dealt with a criminal inquiry into what appeared to be a large-scale organised fraud with issuance of loans of over EUR 147,000,000. Beyond any doubt such an inquiry constituted a matter of significant public interest. It is the fundamental role of the press in a democratic society to deal with such matters, provide coverage of the events for the public, and contribute to discussion. In fulfilling its role as a "public watchdog", the press is entitled to address openly and directly such events of general interest, and the margin of appreciation afforded to a State is significantly narrower in

these cases (see, *mutatis mutandis, Fatullayev,* cited above*,* § 82, with further references). Therefore a certain degree of journalistic exaggeration, provocation, and even immoderate language had to be tolerated (see paragraph 29 above).

35. The libel proceedings were initiated by Mr P., an important political figure and Governor of the region. The Court reiterates that unlike private individuals, politicians inevitably and knowingly lay themselves open to close scrutiny of every word and deed by both journalists and the public at large, and they must consequently display a greater degree of tolerance (see, for instance, *Lingens*, cited above, § 42, Series A no. 103, and Vides Aizsardzības *Klubs v. Latvia*, no. 57829/00, § 40, 27 May 2004).

36. On the other hand, the statements made about Mr P. (see paragraph 9 above) were made in the context of an article uncovering large-scale fraudulent schemes employed by certain individuals in the region. While no explicit and direct connection was drawn between the issuance of loans under falsified documents and Mr P.'s personality or office, the article suggested personal connection between the Governor and Mr R.M., a prominent Kazakhstani politician holding control over the biggest flour producer as well as several other enterprises in the Omsk Region. The business success of Mr R.M. was claimed to be inconceivable without the "benevolence" of Mr P. (see fragment 4 of the text in paragraph 9 above)

37. In this respect the Court reiterates that Article 10 does not guarantee wholly unrestricted freedom of expression to the press, even with respect to coverage of matters of serious public concern. While enjoying the protection afforded by the Convention, journalists must, when exercising their duties, abide by the principles of responsible journalism, namely to act in good faith, provide accurate and reliable information, objectively reflect the opinions of those involved in a public debate, and refrain from pure sensationalism (see *Fressoz and Roire* [GC]*,* cited above, §§ 45, 52; *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, §§ 59, 65, ECHR 1999-III; *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 78, ECHR 2004-XI; *Stoll v. Switzerland* [GC], no. 69698/01, §§ 102-103, 149, ECHR 2007-V; and *Krone Verlag GmbH v. Austria*, no. 27306/07, §§ 46-47, 19 June 2012).

38. Both at the domestic level and before this Court the applicants relied on the distinction between statements of fact and value judgments in justifying the impugned statements. However, they did not present any evidence that their assertions had any factual basis, since in their opinion a value judgment did not necessitate any proof.

39. The Court reiterates that the truth of value judgments is not susceptible to proof and have to be carefully distinguished from facts, which existence can be demonstrated. However, it may be difficult to distinguish between assertions of fact and value judgments when opinions are expressed and allegations are made about a third party's conduct (see paragraph 30

above). In the present case the Court does not find it necessary to make a definitive assessment in respect of the impugned statements in the light of the following.

40. By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see, among other authorities, *Bladet Tromsø and Stensaas*, § 65, cited above). 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 that statement, since even a value judgment without any factual basis to support it may be excessive (see *De Haes and Gijsels*, cited above, § 47; *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II, and *Karpetas v. Greece*, no. 6086/10, § 78, 30 October 2012).

41. The Court has previously considered generally known facts, basic verification, or independent research as a minimal factual basis for statements containing value judgments (see, *mutatis mutandis*, *Mahmudov and Agazade v. Azerbaijan*, cited above, § 44, and, *mutatis mutandis, Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 55, ECHR 2007-IV).

42. These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance (see *Stoll*, § 104, cited above).

43. In these circumstances the Court accepts the conclusion of the domestic courts that the insertion of a comment regarding "benevolence" of a public official towards certain business interests participating in large-scale fraudulent schemes suggested at least some degree of involvement by Mr P. in these schemes and, therefore, have harmed his reputation. The applicants' argument that such an effect was neither intended nor desired by them is not a sufficient justification for departure from the principles of "good faith" reporting. Considering that the applicants failed to provide at least some factual basis for such statements, the Court arrives at the conclusion that the interference was based on "relevant and sufficient" reasons.

44. The last question to be considered by the Court is whether the sanctions imposed on the applicants – publication of a rectification and payment of EUR 1,625 in non-pecuniary damages – was proportionate to the legitimate aim pursued. The Government claimed in their submissions

that the sanction was "fair", given the need to protect the reputation and rights of Mr P. The applicants did not advance any arguments in this regard. Considering the nature of the statements, the amount of non-pecuniary damages awarded jointly against the applicants, and the widespread distribution of the newspaper (see paragraphs 5 and 15 above), the Court is of the opinion that the sanction imposed by the domestic courts was proportionate to the aim pursued.

45. Accordingly, there has been no violation of Article 10 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

46. The first applicant also complained under Article 6 of the Convention about its alleged inability to effectively participate in the trial court's hearing on 15 January 2007. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that this complaint does not disclose any violation of the provision invoked. Therefore it must be rejected in accordance with Article 35 § 3 (a) of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning interference with the applicants' freedom of expression admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 28 March 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro-Lefèvre
Registrar	President