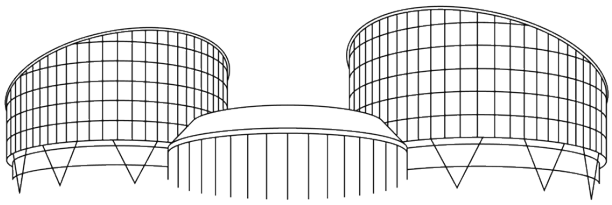

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

Application no. 45083/06
NOVAYA GAZETA and Yelena Valeryevna MILASHINA
against Russia
lodged on 15 September 2006

STATEMENT OF FACTS

THE FACTS

The applicants are ANO "Redaktsionno-Izdatelskiy Dom 'Novaya Gazeta'", a legal entity registered in Moscow under the Russian laws and Ms Yelena Valeryevna Milashina, a Russian national, who was born in 1977 and lives in Moscow.

A. The circumstances of the case

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

1. Background information

At 11.30 am on 12 August 2000 Russian submarine K-141 Kursk ("the Kursk submarine"), a nuclear cruise missile submarine of the Russian Navy, sank in Barents Sea in the course of a naval training exercise as a result of explosions. Most of the crew died within minutes of the explosions. However, twenty-three crew members (of 118 aboard) survived the explosions and gathered in a stern compartment. It remains unknown at what point in time those men died.

An official investigation was launched into the accident under Article 263 § 3 of the Russian Criminal Code (breach of the safety

procedures while exploiting a means of transportation causing death by negligence of two or more people) in case no. 29/00/0016-00.

On 22 July 2002 the Chief Military Prosecutor's Office terminated the investigation for lack of the event of the crime.

On 30 December 2002 Mr B.K., counsel for the relatives of the deceased crew members, challenged the decision to terminate the investigation before the Chief Military Prosecutor. On 4 January 2003 his complaint was dismissed. Mr B.K. challenged both decisions in court.

On 21 April 2004 the Military Court of the Moscow Garrison confirmed the decision of 22 July 2002. On 29 June 2004 the Appellate Collegium of the Military Court of the Moscow Garrison upheld the judgment on appeal.

Between 2000 and 2005 the first applicant published in its newspaper *Novaya Gazeta* ("the newspaper") a number of articles penned by the second applicant covering the Kursk submarine catastrophe and the investigation into it.

2. *The articles*

In late 2004 Mr B.K. introduced an application before the European Court of Human Rights ("the Court") on behalf of Mr R.K. alleging breach of the right to life of Mr R.K.'s son, one of the victims of the Kursk catastrophe.

On 24 January 2005 the newspaper published in issue no. 5 of 24-26 January 2005 an article by the second applicant entitled "The Kursk Case is Now Pending before the European Court" *(«Дело «Курска» - в Европейском суде»)*.

The article referred to the fact that Mr R.K., the father of the Kursk lieutenant-captain D.K., had lodged an application before the Court alleging a violation of Article 2 of the Convention. D.K. was described as a person who had written a note stating that twenty-three persons had survived after the explosions and had been waiting for rescue in the stern compartment. The note had been discovered in October 2000; according to the article, it had refuted the official version that all crew members had died of the explosions. The article stated that after the Kursk had sunk a series of knocks making an SOS signal in the Morse code had been audible from the stern part of the submarine. The Russian officials including the then Prosecutor General, Mr V.U., had refused to consider those knocks as a plea for rescue and established that the noise had originated outside the stern part of the submarine. Mr R.K. had tried in vain to prove in courts that the omission to consider the knocks as a SOS signal amounted to misfeasance in public office. His complaints had been rejected by the Moscow Garrison Military Court and the Moscow Circuit Military Court. The article read, in particular, as follows:

> "R.K., the father of D.K., and his counsel B.K. have repeatedly tried to prove in Russian courts that this is [the failure to qualify the noise as an SOS signal] absurd and [that it constitutes] misfeasance in public office, the purpose of which was to help the Navy officers avoid criminal responsibility.
>
> The misfeasance in public office, according to the plaintiffs, was perpetrated not only by the investigators of the Chief Military Prosecutor's Office but also by the

> experts V.K. and S.K. The reports by those two military officials (V.K. is the chief forensic expert of the Ministry of Defence, S.K. is the chief navigating officer of the Russian Navy) were relied upon by the investigators headed by A.E. and V.U. who terminated the criminal case in relation to the Kursk catastrophe and delivered a decision refusing to prosecute eleven officers of the Northern Fleet."

On 27 January 2005 the newspaper published in its issue no. 6 of 27-30 January 2005 another article by the second applicant entitled "The Prosecutor's Office is Worried by the Prospects of Examination of the Kursk Case by the European Court. All Reasonable Offers Welcome?" *(«Перспективы Европейского суда по «делу «Курска»» взволновали прокуратуру. Торг уместен?»)*. The article described the officials' reaction to the application lodged by Mr R.K. It reported that the prosecutor of the Leningrad Military Circuit had tried to convince Mr R.K. that his counsel had lodged the application exclusively for self-promotion. Mr B.K. had reportedly stated that his client had been willing to cooperate with the prosecutors and implied that Mr R.K. had received an offer to have the official investigation reopened in exchange to withdrawal of his application to Strasbourg. The article read, in particular, as follows:

> "Advocate B.K. representing the forty-seven families of the deceased crew members also confirmed that the application before the European Court was [Mr R.K.'s] last resort. There is no other prospect of success for the Kursk case in Russia owing to the position taken by Prosecutor General V.U. and Chief Military Prosecutor A.S. Apparently, those two officials decided to help the officers-in-command of the Northern Fleet avoid criminal responsibility and to terminate the investigation. (This is what Mr K. wrote in his book "It Drowned... The Truth About the Kursk Hidden by Prosecutor General U<...>")."

3. The defamation proceedings

After the publication of the two articles Mr V.K., the chief forensic expert of the Russian Ministry of Defence, Mr A.E., the head of the investigative group in charge of the Kursk case, Mr A.S., the Chief Military Prosecutor of Russia, and the Chief Military Prosecutor's Office of Russia acting as a legal entity lodged civil actions for defamation against the applicants with the Basmanny District Court of Moscow ("the district court").

On 3 March and 7 July 2005 the Basmanny District Court of Moscow ("the district court") joined the proceedings instituted by Messrs V.K., A.E., A.S. and the Chief Military Prosecutor's Office.

Each plaintiff demanded non-pecuniary damages and refutation of certain information appearing in the articles.

Mr V.K. sought refutation of the following text:

> "... this is ... misfeasance in public office, the purpose of which was to help the Navy officers avoid criminal responsibility. The misfeasance in public office ... was perpetrated not only by the investigators of the Chief Military Prosecutor's Office but also by the experts V.K...."

Mr A.S. insisted that his reputation as the head of the investigative group in charge of the Kursk case had been tarnished by the following text:

> "... this is ... misfeasance in public office, the purpose of which was to help the Navy officers avoid criminal responsibility. The misfeasance in public office ... was perpetrated not only by the investigators of the Chief Military Prosecutor's Office but also by the experts..."

The Chief Military Prosecutor's Office and its head, Mr A.S., wished to refute the following fragments of the articles:

> "... this is ... misfeasance in public office, the purpose of which was to help the Navy officers avoid criminal responsibility. The misfeasance in public office ... was perpetrated not only by the investigators of the Chief Military Prosecutor's Office but also by the experts..."

> "There is no other prospect of success for the Kursk case in Russia owing to the position taken by Prosecutor General V.U. and Chief Military Prosecutor A.S. Apparently, those two officials decided to help the officers-in-command of the Northern Fleet avoid criminal responsibility and to terminate the investigation."

On 7 December 2005 the district court decided upon the case. It established that the information concerning the plaintiffs had been indeed disseminated by the newspaper. It further found that the information in question was damaging to the plaintiffs' reputation for the following reasons. The allegations that the investigators and experts had tried to help the Navy officers avoid criminal responsibility had suggested that they had lacked impartiality requisite when performing their duties. The expression "help avoid criminal responsibility" was found to be defamatory as it contained an allegation of perpetration of a crime. The applicants had failed to provide evidence of the crime committed by the plaintiffs. Their reference to the fact that the article "The Prosecutor's Office is Worried by the Prospects of Examination of the Kursk Case by the European Court. All Reasonable Offers Welcome?" had merely reproduced the position of Mr B.K. reflected in his book was dismissed as unsubstantiated. Furthermore, the district court argued that the applicants had been under an obligation to verify the truthfulness of the information relied upon before publishing it. It dismissed the applicants' assertion that the information in question amounted to value judgment. The district court found in the plaintiff' favour, ordered that refutation of the information concerning involvement of the plaintiffs in misfeasance in public office be published and awarded 50,000 and 7,000 Russian roubles (approximately 1,470 and 205 euros (EUR)) to be paid to each plaintiff by the first and second applicants, respectively. The applicants were moreover ordered to pay court fees.

The applicants appealed arguing, inter alia, that the information contained in the impugned articles amounted to value judgment and that the impugned information contained in the newspaper articles reflected opinions of Messrs. R.K. and B.K. revealed in the former's application to Strasbourg and the latter's book.

On 16 March 2006 the Moscow City Court dismissed the appeal and upheld the district court's judgment in full.

The applicants further applied for supervisory review but to no avail.

B. Relevant domestic law and practice

1. Constitution of the Russian Federation

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

2. Civil Code of the Russian Federation

Article 152 provides that an individual may apply to a court with a request for the rectification of statements (*svedeniya*) 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.

3. Resolution of the Plenary Supreme Court of the Russian Federation, no. 3 of 24 February 2005

The Resolution requires the courts hearing defamation claims to distinguish between statements of fact, 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 (paragraph 9).

COMPLAINT

The applicants complain under Article 10 of the Convention that the judgments of the domestic courts unduly restricted their right to freedom of expression.

QUESTIONS

1. Was there an interference with the applicants' rights under Article 10 of the Convention as a result of the defamation proceedings before the domestic courts which resulted in the judgment of 16 March 2006 by the Moscow City Court?

2. If so, did it comply with the requirements of the second paragraph of that Convention provision? In particular, can it be said that the domestic courts respected the distinction between statements of facts and value judgment and performed a balancing exercise between the need to protect the plaintiffs' reputation and the Convention standard?