…

THE FACTS

The applicant, Mr Mykola Mykytovych Melnychuk, is a Ukrainian national who was born in 1929 and lives in Berdychiv, in the Zhytomyr region of Ukraine.

A. The circumstances of the case

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

In 1996 the *Berdychevska Zemlya*, a local newspaper, published a critical review by Mr P. of a book written by the applicant.

On 26 January 2001 the same newspaper published another article by Mr P. about a new book of poetry also written by the applicant. Mr P. wrote that the applicant's book looked good, but that it had no soul. Mr P. observed that he had previously commented on another book by the same author and explained that, without a basic knowledge of literary writing and respect for the rules of language, one could not be a poet. Mr. P. then gave a number of examples from the applicant's new book where the author used numerous Russian words in the Ukrainian text. One of the quotations from the applicant's book was "The town looks like a girl/ But also has something from the goat/ Though Berdychiv [name of the town] is older/ Almost twice [older]". Mr P. also criticised the author for using portraits of and making references to Taras Shevchenko, a famous Ukrainian poet. Mr P. called the applicant's poetry the "theatre of the absurd". He advised the sponsors of the book to put their money to better use by giving it to charity rather than funding the publication of books of dubious quality. Finally, he stated that the existence of such books could be harmful for the public, particularly schoolchildren, who might think that the printed word was a model for language use.

On 14 April 2001 the applicant submitted a written reply to the newspaper, requesting that it be published. He pointed out that Mr P. was a member of the Union of Writers, and went on to refer to Mr P. as the "member" (*член*), a word which is widely used in vulgar language for the penis. He further claimed that Mr P. was jealous of his popularity and gave a confusing account of Mr P.'s political and business activities. The applicant compared himself to the writers who were persecuted during the Soviet era. He accused Mr P. of being an alcoholic who wrote low-quality verse about birds, and who tried to increase his political standing by criticising other writers. The applicant further disputed the criticism of his use of vocabulary. Finally, he called Mr P. "subhuman" (*відлюдок*).

The applicant's request for the publication of his reply was refused.

In May 2002 the applicant instituted proceedings in the Berdychivskiy City Court against the *Berdychevska Zemlya* newspaper, claiming compensation for pecuniary and non-pecuniary damage caused by the publication of the above-mentioned articles. He maintained that they had undermined his popularity and violated his copyright. He also requested the court to order the newspaper to publish his reply to the impugned articles.

Before the court, the newspaper's representatives maintained that they had refused to publish the applicant's reply because it contained obscene and abusive remarks about Mr P. The applicant had been informed of this in writing, and had been invited to amend his reply accordingly. The applicant maintained that he had never received this written refusal, which he believed to have been falsified, and claimed to have received only oral refusals over the telephone.

On 27 September 2002 the court found against the applicant. The court established that Mr P.'s articles were written in the form of book reviews, in which the author expressed his personal opinion about the quality of the applicant's literary work. It found that the newspaper had been entitled to agree or refuse to publish the applicant's protest. The newspaper had refused to publish the applicant's views because they contained obscene and abusive remarks about the book reviewer's personality, rather than a reply to the content of the articles in question. This ground for refusal was provided for by section 37 of the Press Act. The court also dismissed as being unsubstantiated the applicant's complaint about an alleged violation of his copyright.

The applicant appealed to the Zhytomyr Court of Appeal, stating, *inter alia*, that section 37 of the Press Act entitled him to demand the rectification of untruthful or defamatory information about him.

On 16 December 2002 the Zhytomyr Court of Appeal upheld the decision of the first-instance court. It also observed that the impugned articles contained opinions, not facts, and that their content could not therefore be examined in terms of veracity.

On 30 October 2003 a panel of three judges of the Supreme Court of Ukraine dismissed the applicant's request for leave to appeal in cassation.

B. Relevant international and domestic law

1. *Resolution (74) 26 of the Committee of Ministers of the Council of Europe on the right of reply – Position of the individual in relation to the press*

The relevant extracts of the resolution read as follows:

"The Committee of Ministers ...

Recommends to member governments, as a minimum, that the position of the individual in relation to the media should be in accordance with the following principles:

1. In relation to information concerning individuals published in any medium, the individual concerned shall have an effective possibility for the correction, without undue delay, of incorrect facts relating to him which he has a justified interest in having corrected, such correction being given, as far as possible, the same prominence as the original publication.

2. In relation to the information concerning individuals published in any medium, the individual concerned shall have an effective remedy against the publication of facts and opinions which constitute:

...

ii. an attack upon his dignity, honour or reputation ...”

2. *Recommendation 1215 (1993) of the Parliamentary Assembly of the Council of Europe on the ethics of journalism*

The relevant extract of the recommendation reads as follows:

“...

5. The Assembly consequently recommends that the Committee of Ministers:

i. ask governments of member States to see that legislation guarantees effectively the organisation of the public media in such a way as to ensure neutrality of information, plurality of opinions and gender balance, as well as a comparable right of reply to any individual citizen who has been the subject of an allegation;

...”

3. *Appendix to Recommendation No. R (97) 20 of the Committee of Ministers to member States on “hate speech”*

The relevant extract of the appendix to the recommendation reads as follows:

“**Principle 2**

The governments of the member States should establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or the rights of others.

To this end, governments of member States should examine ways and means to:

...

– enhance the possibilities of combating hate speech through civil law ... by ... providing for the possibility of court orders allowing victims a right of reply or ordering retraction;

..."

4. Recommendation Rec(2004)16 of the Committee of Ministers to member States on the right of reply in the new media environment

The relevant extracts of the recommendation read as follows:

"**1. Scope of the right of reply**

Any natural or legal person, irrespective of nationality or residence, should be given a right of reply or an equivalent remedy offering a possibility to react to any information in the media presenting inaccurate facts about him or her and which affect his/her personal rights."

"**5. Exceptions**

By way of exception, national law or practice may provide that the request for a reply may be refused by the medium in question in the following cases:

...

– if the reply is not limited to a correction of the facts challenged;

..."

"**8. Settlement of disputes**

If a medium refuses a request to make a reply public, or if the reply is not made public in a manner satisfactory for the person concerned, the possibility should exist for the latter to bring the dispute before a tribunal or another body with the power to order the publication of the reply."

5. Printed Media (Press) Act

The relevant extracts from the Printed Media (Press) Act provide:

Section 3
Impermissibility of abuse of the freedom of action of the printed mass media

"... It shall be prohibited to use the printed mass media for:

– an interference with the private life of citizens, or an attack on their honour and dignity;

..."

Section 37
Rectification of information

"Citizens, legal entities and State bodies and their legal representatives shall be entitled to demand the rectification of information published about them or data that do not correspond to the truth or defame their honour and dignity.

If the editorial board has no evidence that the information published by it corresponds to the truth, it must rectify this information at the plaintiff's request in the next issue of the printed media or publish a rectification on its own initiative. ...

The editorial board shall refuse to publish the reply if it:

1. violates the provisions of section 3 of this Act;

...

The editorial board shall within a month of receipt of the reply ... inform the applicant in writing ... of the refusal to publish the reply, indicating the grounds for such a refusal ..."

COMPLAINTS

The applicant complained under Article 6 § 1 of the Convention of the outcome of the domestic proceedings. He further complained under Article 10 of the newspaper's refusal to publish his reply to the criticism of his books. He finally complained that his copyright had been violated by the impugned articles, contrary to Article 1 of Protocol No. 1.

THE LAW

1. The applicant complained of the outcome of the domestic proceedings. He relied on Article 6 § 1 of the Convention, the relevant parts of which provide:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

The Court notes that it is not its task to act as a court of appeal or, as is sometimes stated, as a court of fourth instance, in respect of the decisions taken by domestic courts. It is the role of the domestic courts to interpret and apply the relevant rules of procedural or substantive law. Furthermore, it is the domestic courts that are best placed for assessing the credibility of witnesses and the relevance of evidence to the issues in the case (see, among many other authorities, *Vidal v. Belgium*, judgment of 22 April 1992,

Series A no. 235-B, p. 32, § 32, and *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, § 34).

Having regard to the materials submitted by the applicant, the Court finds that the applicant has failed to substantiate any claim that the procedural guarantees contained in Article 6 were breached in his case.

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

2. The applicant further complained of the newspaper's refusal to publish his reply. This complaint raises an issue under Article 10 of the Convention, the relevant parts of which provide:

> "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. ...
>
> 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 ..."

The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and for each individual's self-fulfilment. The Court considers that the right of reply, as an important element of freedom of expression, falls within the scope of Article 10 of the Convention. This flows from the need not only to be able to contest untruthful information, but also to ensure a plurality of opinions, especially in matters of general interest such as literary and political debate.

At the same time, the restrictions and limitations of the second paragraph of Article 10 are equally pertinent to the exercise of this right. It should be borne in mind that the State's obligation to ensure the individual's freedom of expression does not give private citizens or organisations an unfettered right of access to the media in order to put forward opinions (see *X and the Association Z v. the United Kingdom*, no. 4515/70, Commission decision of 12 July 1971, Yearbook 14, p. 538; *Stiftelsen Contra v. Sweden*, no. 12734/87, Commission decision of 9 December 1988, unreported; and, *mutatis mutandis*, *Murphy v. Ireland*, no. 44179/98, § 61, 10 July 2003).

The Court notes that, as a general principle, newspapers and other privately owned media must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals. However, there may be exceptional circumstances in which a newspaper may legitimately be required to publish, for example, a retraction, an apology or a judgment in a defamation case. Consequently, there will be situations when a positive obligation may arise for the State to ensure an individual's freedom of expression in such media (see *Winer v. the United Kingdom*, no. 10871/84, Commission decision of 10 July 1986,

Decisions and Reports (DR) 48, p. 154, and *Spencer v. the United Kingdom*, nos. 28851/95 and 28852/95, Commission decision of 16 January 1998, DR 92-A, p. 56). In any event, the State must ensure that a denial of access to the media is not an arbitrary and disproportionate interference with an individual's freedom of expression, and that any such denial can be challenged before the competent domestic authorities.

The Court considers that in the present case a positive obligation arose for the State to protect the applicant's right to freedom of expression by ensuring, firstly, that he had a reasonable opportunity to exercise his right of reply by submitting a response to the newspaper for publication and, secondly, that he had an opportunity to contest the newspaper's refusal (see "Relevant international and domestic law" above).

In that connection, the Court notes that the applicant was able to submit his reply to the newspaper and that the refusal to publish it was based on the fact that the applicant had gone beyond simply replying to the criticism which had been made of his book, and had made obscene and abusive remarks about the critic. Moreover, it appears from the case file that the applicant was invited to amend his reply but failed to do so. He was subsequently afforded an opportunity to assert his right of reply before the domestic courts, which balanced his freedom of expression against the critic's interests. The Court finds no elements of arbitrariness in the decisions of the domestic courts. Accordingly, it concludes that a fair balance was struck between the competing interests and that there was no failure on the part of the State to comply with its positive obligations under Article 10.

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

3. Finally, the applicant complained that the newspaper articles about his books violated his copyright. He relied in substance on Article 1 of Protocol No. 1, the relevant part of which provides:

> "Every natural ... person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

The Court reiterates that intellectual property is protected by Article 1 of Protocol No. 1 (see, for example, *A.D. v. the Netherlands*, no. 21962/93, Commission decision of 11 January 1994, DR 76-A, p. 157). It further observes that the fact that the State, through its judicial system, provided a forum for the determination of the applicant's rights and obligations does not automatically engage its responsibility under Article 1 of Protocol No. 1 (see *Breierova and Others v. the Czech Republic* (dec.), no. 57321/00, 8 October 2002). In exceptional circumstances, the State might be held responsible for losses caused by arbitrary determinations. However, the Court refers to its findings above, under Article 6 § 1 of the Convention, that in the present case the national courts proceeded in accordance with

domestic law, giving full reasons for their decisions. Thus, their assessment was not flawed by arbitrariness or manifest unreasonableness contrary to Article 1 of Protocol No. 1.

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

For these reasons, the Court unanimously

Declares the application inadmissible.