



Defamation proceedings following reports on investigation into Kursk catastrophe violated journalist's and publisher's right to freedom of expression

In today's **Chamber judgment**¹ in the case of **Novaya Gazeta and Milashina v. Russia** (application no. 45083/06) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned defamation proceedings against an editorial house and a journalist following the publication of two articles concerning the sinking of the Russian Navy's nuclear cruise missile submarine "Kursk" in the Barents Sea in August 2000 and the investigation into the accident.

In particular, the articles in question reported on statements by a relative of one of the victims and his counsel to the effect that the officials in charge of the investigation, which had eventually been terminated, were guilty of abuse of public office.

The Court considered in particular that the publisher and the journalist had been found liable for having reported the opinions of third parties. Although particularly strong reasons would have been required to punish a journalist for assisting in the dissemination of statements made by another person, the national courts had not provided any such reasons. They had considered it completely irrelevant whether the journalist had expressed her own views or those of a third party. Overall, the national courts' reasoning in the case had appeared to be based on the assumption that the protection of the claimants' reputation prevailed over freedom of expression in all circumstances.

Principal facts

The applicants in this case are ANO "Redaktsionno-Izdatelskiy Dom 'Novaya Gazeta'", an editorial house in Moscow ("the publisher") which publishes the national newspaper *Novaya Gazeta*, and the journalist Yelena Milashina, a Russian national, born in 1977 and living in Moscow.

In January 2005, *Novaya Gazeta* published two articles by Ms Milashina concerning the sinking of the Russian Navy's nuclear cruise missile submarine "Kursk" in the Barents Sea on 12 August 2000 and the investigation into the accident. While most of the crew died within minutes of the explosions that had taken place on board of the submarine on that day, 23 crew members survived and wrote a note describing the events. All of these 23 men died, however, before the arrival of the rescue team. An investigation by the military prosecutor was terminated in 2002 for lack of evidence of a crime.

The two articles reported on the fact that the father of D.K., lieutenant-captain of the Kursk who had died on board of the submarine, had lodged an application before the European Court of Human Rights, alleging a violation of D.K.'s right to life.

The first article described D.K. as the person who had written the note stating that the crew members who had survived the explosions had been waiting for rescue. According to the article, the note, which had been found in October 2000, refuted the official version that all crew members had

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

died as a result of the explosions. The article stated that D.K.'s father and his counsel, B.K., had tried to prove before the Russian courts that investigators of the military prosecutor's office and the chief forensic expert of the Ministry of Defence were guilty of abuse of public office, since they had failed to acknowledge that a series of knocks coming from inside the submarine on the day of the accident had been an SOS signal in Morse code.

The second article stated, in particular, that B.K., who represented 47 families of the deceased crew members, considered the application before the European Court of Human Rights the last resort, given that the Prosecutor General and the Chief Military Prosecutor had apparently taken "a decision to help the officers in command of the Northern Fleet escape criminal responsibility and to terminate the investigation."

Defamation proceedings against the publisher and Ms Milashina were brought by the chief forensic expert of the Ministry of Defence, the head of an investigative group in the Chief Military Prosecutor's office, the Chief Military Prosecutor of Russia and the Chief Military Prosecutor's office as a legal entity. In December 2005 a district court of Moscow found in the claimants' favour. It held in particular that the expression "to help escape criminal responsibility" was defamatory, as it contained an allegation of criminal conduct. It ordered the publisher to publish a retraction of the statement concerning the claimants' involvement in abuse of public office. The publisher and Ms Milashina were ordered to pay to each claimant the equivalent of approximately 1,500 and 200 euros, respectively, in damages. The judgment was upheld on appeal.

Complaints, procedure and composition of the Court

The publisher and Ms Milashina complained that the Russian courts' judgments had violated their rights under Article 10 (freedom of expression) of the European Convention on Human Rights.

The application was lodged with the European Court of Human Rights on 15 September 2006.

Judgment was given by a Chamber of seven judges, composed as follows:

Branko **Lubarda** (Serbia), *President*,
Luis **López Guerra** (Spain),
Helen **Keller** (Switzerland),
Dmitry **Dedov** (Russia),
Pere **Pastor Vilanova** (Andorra),
Alena **Poláčková** (Slovakia),
Georgios A. **Serghides** (Cyprus),

and also Stephen **Phillips**, *Section Registrar*.

Decision of the Court

Article 10

It was uncontested between the parties that the district court's judgment of December 2005 had constituted an interference with the publisher's and Ms Milashina's right to freedom of expression. The Court was satisfied that the interference had been lawful under the relevant provisions of domestic law and that it had pursued a legitimate aim, namely "the protection of the reputation or rights of others", for the purpose of Article 10 of the Convention.

As to the question of whether the interference had been "necessary in a democratic society" within the meaning of Article 10, the Court underlined that the four claimants in the defamation proceedings, by virtue of their respective positions, should have been more tolerant to criticism than private individuals. Three of the claimants were high-ranking public servants and the fourth, the

Chief Military Prosecutor's office of Russia, was a State agency. It was true that prosecutors, as part of the judicial system, were to enjoy protection from offensive and abusive attacks. However, that did not give them immunity from any criticism in the media of their actions performed in their official capacity.

Regarding the subject of the articles in question, the Court noted that the Kursk catastrophe was without a doubt a matter of general interest in Russia; consequently the publisher and Ms Milashina had contributed to a debate of public interest. The Court moreover observed that the articles could not be considered offensive nor had they included unfounded personal attacks on the claimants.

Having regard both to the claimants' respective positions and to the subject matter of the articles, the Court considered that the national authorities had only a narrow leeway ("margin of appreciation" in the Court's case-law) in establishing the necessity of interfering with the applicants' freedom of expression.

The Court was not satisfied that the Russian courts had performed a balancing exercise between the need to protect the claimants' reputation and the applicants' rights under Article 10 of the Convention. Instead, the national courts' reasoning had appeared to be based on the assumption that the protection of "the honour and dignity of others" prevailed over freedom of expression in all circumstances. Finding for the claimants, the courts made no allowances for the essential function which the media fulfil in a democratic society.

The Court considered that the essence of the case was the fact that the publisher and Ms Milashina had been found liable for having reported the opinions of third parties, namely the father of lieutenant-captain D.K. and B.K., counsel representing the families of the deceased crew members of the Kursk. Under the Court's case-law, particularly strong reasons would have been required to punish a journalist for assisting in the dissemination of statements made by another person. However, the Russian courts had not provided any such reasons. They had considered it completely irrelevant whether the journalist had expressed her own views or those of a third party.

Furthermore, the Court disagreed with the Russian Government's submission that the applicants had not acted "in good faith". The articles had made it clear to readers that Ms Milashina was reporting the opinions of D.K.'s father and B.K. about acts which, in B.K.'s view, constituted an abuse of public office. Those opinions had been expressed in the complaints brought by D.K.'s father and B.K. at national level and before the European Court of Human Rights, as well as in a book published by B.K. Under these circumstances it could not be said that the applicants had failed to provide a factual basis for the statements in question. They had acted in accordance with the ethics of journalism and Ms Milashina had applied the diligence expected of a responsible journalist reporting on a matter of public interest.

Finally, the fact that the proceedings against the applicants had been civil rather than criminal and that the damages they had been ordered to pay were relatively modest did not change the Court's finding that the Russian courts had applied standards which had not been in conformity with the principles embodied in Article 10.

There had accordingly been a violation of Article 10 of the Convention.

Just satisfaction (Article 41)

The Court held that Russia was to pay 2,388 euros (EUR) to the publisher and EUR 170 to Ms Milashina in respect of pecuniary damage, EUR 1,000 to the publisher and EUR 2,000 to Ms Milashina in respect of non-pecuniary damage and EUR 22 to the publisher in respect of costs and expenses.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.