



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

THIRD SECTION

CASE OF OOO REGNUM v. RUSSIA
(Application no. 22649/08)

JUDGMENT

Art 10 • Freedom of expression • Electronic news media convicted of defamation against a commercial company after reporting on mercury poisoning from distributed soft drink • Internet and the protection of business reputation • Difference between the reputational interests of a legal entity and the reputation of an individual • News items on consumer protection of considerable public interest • Failure of the domestic court to see the defamation dispute in the context of the general interest in receiving reports on the discovery of a potential health hazard • Short and purely informational news items • No discussion on consequences of the publication on the commercial company • News items passing on the authorities' message on a public health issue • Web publication in full compliance with the tenets of responsible journalism • Interest and duty of the media in reporting on potential health hazards, and obligations of the domestic courts to demonstrate convincingly the existence of a pressing social need capable of justifying an interference with freedom of the media • Award of damages for defamation to bear a reasonable relationship of proportionality to the injury to reputation suffered • Sizeable award of damages having a “chilling effect” • Absence of fair balance between the electronic media outlet's right to freedom of expression and the commercial company's right to reputation

STRASBOURG

8 September 2020

FINAL

08/12/2020

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

In the case of OOO Regnum v. Russia,

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

Paul Lemmens, *President*,
Georgios A. Serghides,
Helen Keller,
Dmitry Dedov,
Alena Poláčková,
Lorraine Schembri Orland,
Ana Maria Guerra Martins, *judges*,
and Milan Blaško, *Section Registrar*,

Having regard to:

the application (no. 22649/08) 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 OOO Regnum, a limited liability company under Russian law (“the applicant company”), on 10 April 2008;

the decision of 2 November 2017 to give notice of the application to the Russian Government (“the Government”);

the parties’ observations;

Having deliberated in private on 30 June 2020,

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

INTRODUCTION

1. The applicant company, an electronic news outlet, reported information disseminated by the local police and the State consumer protection agency regarding mercury poisoning following consumption of a branded juice-based drink. Drinks marketed under the brand in question were produced by at least two legal entities, one of which brought defamation proceedings against the applicant company before the commercial courts. The lower commercial courts dismissed the claims, but the commercial court that heard a cassation appeal brought by the claimant found against the applicant company and ordered it to pay the claimant a sizeable award. The applicant company alleged a violation of their right to freedom of expression.

THE FACTS

2. The applicant company is based in Moscow and was represented by Ms G. Arapova, a lawyer practising in Voronezh.

3. The Government were represented by Mr M. Galperin, the Representative of the Russian Federation to the European Court of Human Rights.

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

I. BACKGROUND INFORMATION

5. The applicant company is the founder of the REGNUM Information Agency (“Regnum”). Regnum is registered as a media outlet under the Media Act (see paragraph 38 below) and focuses on reporting economic, political and social news. The applicant company owns Regnum’s website, www.regnum.ru (“the website”). Regnum’s editorial board lacks the status of a legal person.

6. On 19 November 2005 an investigator from the Ukhta district department of the interior (“UVD”) received information from a local hospital that a female resident of the Ukhta District, the Komi Republic, had been admitted to hospital with mercury poisoning following the consumption of a carton of juice-based drink marketed under the “Lyubimyy Sad” brand. The same information reached various local media outlets.

7. A Regnum correspondent sought commentary from the main department of the Ministry of Catastrophes and Emergencies in the Komi Republic (*МЧС* – “the Komi MCE”). The correspondent was told that on 19 November 2005 a woman had become unwell after consuming a “Lyubimyy Sad” drink. She had been admitted to hospital and diagnosed with mercury poisoning. An inquiry had been opened into the incident.

II. IMPUGNED NEWS ITEMS

8. On 21 November 2005 a news item appeared on the website under the heading “Mercury found in ‘Lyubimyy Sad’ juice”. In three short paragraphs the item informed its readers that (a) a thirty-seven-years old woman had contacted the emergency services of a local hospital after she had found mercury globules in the carton of an apple juice-based drink bought in a local shop; (b) officers of the UVD and the Komi MCE had visited the scene of the incident; (c) on 20 November 2005 the UVD, together with personnel of the Komi branch of the Federal Consumer Protection Service (*Роспотребнадзор* – “the FCPS”) had opened an inquiry, seized cartons of the “Lyubimyy Sad” drink and sent them for an expert examination with a view to detecting mercury; (d) a panel of experts had analysed the seized cartons; (e) the work on identifying and seizing suspect drink cartons was underway; (f) the victim was still in hospital in a “satisfactory” condition; and (g) mercury globules had already been found in a “Lyubimyy Sad” drink in 2004 when a pregnant woman had consumed it.

9. On 22 November 2005 the website published a news item headed “Prosecutor’s office of Komi [Republic] opens a criminal case into the ‘Lyubimyy Sad’ juice poisoning”. In two short paragraphs it related the following. According to information provided by the Komi MCE, on 21 November 2005 the Ukhta prosecutor’s office had opened a criminal case regarding the fact of mercury poisoning. Unspecified State agencies had continued searching for and seizing from shops cartons of the “Lyubimyy Sad” drink produced in the same batch. The woman who had bought the drink carton containing mercury globules remained in hospital in a satisfactory condition.

10. On the same date a Regnum correspondent approached the Komi branch of the FCPS in person, requesting new information. The head of the branch, Ms G., orally confirmed that mercury had been detected in a “Lyubimyy Sad” apple drink.

11. In support of Ms G.’s oral statement, the deputy head of the Komi branch of the FCPS, Mr K., sent Regnum by fax a copy of a letter dated 22 November 2005. It named the heads of local branches of the FCSP as addressees and contained the following information:

“[The Komi branch of the FCPS] informs [you] that, according to the information received from [the Komi branch of the FCPS in Ukhta], mercury was detected in the ‘Lyubimyy Sad’ ‘Apple’ drink 0.2 l, TU 9163-043-51114834-01, ‘Vimm-Bill-Dann Company’. Date of production: 30 September 2005, expiry date 30 September 2006. Batch R 09:13 #12. Producer: JSC ‘Ramenskiy Molochnyy Zavod’ R-Russia [at] 1 Transportnyy Proyezd Ramenskoe 140100 the Moscow Region, F1-Russia [at] 108 Dmitrovskoe Shosse Moscow 127591, N2 – JCS ‘Vladivostokskiy Molochnyy Kombinat’ [at] 19 Strelochnaya Street Vladivostok 690087.

Certification mark PR71, AY a79. Packaging Tetra Brik Aseptik Printed in [Kyiv].

Following the above I would propose checks of large [the remainder of the line in the copies at the Court’s disposal is illegible].

Should the products mentioned above be found, I would ask that requisite measures be taken in accordance with the established procedure, including those aimed at a halt of sales until further notice.”

12. On 23 November 2005 a news item prepared on the basis of the faxed letter from the FCPS was published on the website. It read in its entirety as follows:

“The fact that mercury was found in a juice-based drink ‘Lyubimyy Sad’ has been established (Komi).

According to information obtained from the [local branch of the FCPS], it was an established fact that mercury had been detected in the ‘Lyubimyy Sad’ ‘Apple’ drink 0.2 l, TU 9163-043-51114834-01, ‘Vimm-Bill-Dann Company’, [as] Ms G., the head of the Ukhta branch, informed a Regnum correspondent.

Date of production: 30 September 2005. Batch R 09:13 #12. Producer: JSC ‘Ramenskiy Molochnyy Zavod’ R-Russia [at] 1 Transportnyy Proezd Ramenskoe the Moscow Region 140100, F1-Russia [at] 108 Dmitrovskoe Shosse Moscow 127591, N2 – JCS ‘Vladivostokskiy Molochnyy Kombinat’ [at] 19 Strelochnaya Street

Vladivostok 690087 Russia. Certification mark PR71, AYa79. Packaging Tetra Brik Aseptik Printed in [Kyiv].

The [Komi branch of the FCPS] has proposed to carry out checks at large enterprises and shops to see whether these products are present.

Should the products be found, measures would be taken in accordance with the established procedure, including those aimed at a halt of sales until further notice by the [Komi branch of the FCPS]. The entire batch of the apple juice-based drink 'Lyubimyy Sad' has been seized from shops in Ukhta, including twenty-one cartons seized from a wholesaler's warehouse."

III. OTHER NEWS ITEMS PUBLISHED ON THE WEBSITE

13. In addition to the three news items above, on various dates Regnum published on the website the following news items: "The prosecutor's office has not confirmed the opening of a criminal case regarding the juice poisoning" (22 November 2005); "The possibility of natural mercury contamination of the 'Vimm-Bill-Dann' juice is excluded" (22 November 2005); "'Vimm-Bill-Dann' has denied the allegations that there could be mercury in the juice" (23 November 2005); and "No mercury found in the seized cartons of 'Lyubimyy Sad' juice-based drink" (8 December 2005).

IV. DEFAMATION PROCEEDINGS

14. On 29 March 2006 one of the legal entities that produced soft drinks under the "Lyubimyy Sad" brand, joint-stock company Ramenskiy Molochnyy Kombinat ("JSC RMK"), brought a defamation claim against the applicant company before a commercial court. They sought a retraction of the three news items (see paragraphs 8, 9 and 12 above) in their entirety, their removal from the website, and compensation for non-pecuniary damage in the amount of 1,000,000 Russian roubles (RUB).

A. Judgment of 7 July 2006

15. On 7 July 2006 the Commercial Court of Moscow ("the Moscow Court") dismissed the claim in full. It reasoned that the impugned news items had not mentioned the claimant directly: the "Lyubimyy Sad" brand had not been in JSC RMK's exclusive use and the drinks marketed under it had also been produced by another legal entity operating in Vladivostok. The Moscow Court rejected the claimant's argument that the letter from the FCPS faxed to Regnum could not be considered a "reply to a request for information" within the meaning of section 57(3) of the Media Act because it had not been a response to a formal request and it had been signed by Mr K., not by Ms G. who had been mentioned in the news item of 23 November 2005 as the source of information. It found that the disseminated information had originated from the FCPS, a State agency,

and thus had fallen under the exception provided for by section 57(3) of the Media Act exempting a media outlet or journalist from responsibility. Assessing the whole series of the news items published on the website between 21 November and 8 December 2005, the Moscow Court found “no grave abuse by a media outlet of the right to disseminate information”. It noted that the defendant had reported on 8 December 2005 that no mercury had been found in the seized drinks and thus had *de facto* “refuted the fact of mercury detection reported earlier”. The Moscow Court further noted that the removal of the news items from the website sought by the claimant could not be applied as a sanction in a defamation case under Article 152 of the Civil Code in view of a lack of legal basis. It also considered the claimant’s demand for an apology groundless in view of the lack of legal basis and held that to rule otherwise would violate Article 29 § 3 of the Russian Constitution guaranteeing that no one may be forced to reject his or her views and convictions.

B. Claimant’s appeal to the Appellate Court

16. JSC RMK appealed against the judgment of 7 July 2006 to the Ninth Commercial Appellate Court (“the Appellate Court”).

17. On 12 September 2006 the Appellate Court quashed the judgment on the grounds that the case materials had not contained the transcript of one of the Moscow Court’s hearings. The Appellate Court decided to hear the case anew in accordance with the rules set for a first-instance court (see paragraph 37 below).

C. Judgment of 30 November 2006

18. On 30 November 2006 the Appellate Court delivered its judgment. Accepting that the impugned news items had been disseminated, it disagreed with the claimant’s assertion that they had concerned JSC RMK directly.

19. The Appellate Court considered that the claimant had been contesting the following allegations made in the news items: (a) mercury globules had been found in a carton of “Lyubimyy Sad” drink; (b) the fact that mercury had been detected in that drink had been confirmed; and (c) the prosecutor’s office had opened a criminal case in respect of the detection of mercury.

20. The Appellate Court observed that JSC RMK formed part of the Vimm-Bill-Dann company and was not the sole producer of the apple juice-based drink marketed under the “Lyubimyy Sad” brand. The claimant’s exact name had not been mentioned in the news items. The impugned news items of 21 and 22 November 2005 had not contained any statements to the effect that JSC RMK produced dangerous foods

containing mercury or any allegations of impropriety or lack of scruples on the part of that company.

21. The Appellate Court further noted that the statements that mercury had been detected in a carton of “Lyubimyy Sad” drink, and that a criminal case had been opened had been provided by the FCPS by fax at the defendant’s oral request. It rejected the claimant’s assertion that the FCPS’s letter of 22 November 2005 could not be regarded as lawfully obtained information merely because it had not been in response to a formal written request. It reasoned that the news item of 23 November 2005 had directly quoted the letter from a State authority (or one of its civil servants) and that the author of the letter had confirmed its authenticity at the Appellate Court’s request. Noting that the defendant had submitted documentary evidence proving that the UVD had been sending and receiving telegrams, reports and phone calls to and from various correspondents concerning the presumed detection of mercury and related inquiry as of 19 November 2005, the Appellate Court considered that the defendant had not acted in bad faith and had “disseminated the statements with a view to informing [the public] of a socially dangerous situation”.

22. The Appellate Court considered that the fact that no criminal proceedings had been instituted in connection with the poisoning did not mean that the defendant had tarnished JSC RMK’s reputation, because there had been an inquiry, and the defendant might not have been familiar with the intricate details of the police procedure.

23. On the basis of the above, the Appellate Court dismissed JSC RMK’s appeal in full.

24. JSC RMK lodged a cassation appeal against the judgment of 30 November 2006.

D. Judgment of 28 February 2007

25. On 28 February 2007 the Federal Commercial Court of the Moscow Circuit (“the Circuit Court”) quashed the judgment of 30 November 2006 and remitted the case to the Appellate Court for a fresh examination. It reasoned, in particular, as follows:

“The Appellate Court did not consider that section 57 of [the Media Act] stipulates the grounds for exempting [media outlets and journalists] from responsibility for breaking the laws on media operations.

At the same time Article 152 § 2 (1) of the Civil Code of the Russian Federation does not make the obligation of a media outlet to retract statements tarnishing business reputation conditional on the presence or absence of the fact of a breach of the laws on media outlets.

Therefore, under the general rule of Article 152 of the Civil Code of the Russian Federation, the obligation to refute statements tarnishing business reputation is not conditional on a breach of the laws on media outlets, and, consequently, on the imposition of responsibility under [the Media Act].”

26. On 25 June 2007 at the claimant's request following a change in its name JSC RMK was replaced with JSC Vimm-Bill-Dann Napitki ("JSC VBDN") as a claimant in the proceedings.

E. Judgment of 2 July 2007

27. On 2 July 2007 the Appellate Court delivered a new judgment in the case. It noted that the burden to prove that the impugned statements had concerned a specific legal person lay with the claimant, and rejected JSC VBDN's contention that the letter "R" in the news item of 23 November 2005 had unequivocally identified the claimant, and not another producer of the branded drink. It further noted that the item in question had mentioned "Ramenskiy Molochnyy Zavod", not "Ramenskiy Molochnyy Kombinat", and that the former name did not appear in the Unified State Register of Legal Persons and thus did not exist. It dismissed the claims in full for the reason that the claimant had not proved that the disseminated statements had concerned JSC RMK directly.

28. JSC VBDN lodged a cassation appeal against the judgment of 2 July 2007.

F. Judgment of 10 October 2007

29. On 10 October 2007 the Circuit Court quashed the judgment of 2 July 2007 and delivered a new judgment granting the claims in full. It reasoned that the Appellate Court had wrongly considered that the claimant could not be identified on the basis of the impugned statements. The Circuit Court held that (a) the three impugned news items had stemmed from the same "alleged fact of mercury poisoning"; (b) the news item of 23 November 2005 had mentioned the address of the claimant; and (c) consumers could have confused the names "Ramenskiy Molochnyy Zavod" and "Ramenskiy Molochnyy Kombinat".

30. To support its position that the three news items sufficiently identified JSC RMK as the target of the allegedly defamatory statements distinguishable from other producers of the branded soft drink, the Circuit Court referred to the refusal of 19 December 2005 to open criminal proceedings, the reports by the UVD hierarchy of 20 November and 8 December 2005 and the incident reports of 20 November 2005. According to the Circuit Court, it followed from those documents "drawn up in connection with the inquiry by the investigative unit of the UVD into the report of suspected mercury poisoning following the consumption of 'Lyubimyy Sad' juice" that "the seizure and analysis of 'Lyubimyy Sad' juice produced by JSC RMK [had been] performed in connection with the inquiry into the possible poisoning of Ms F. in Yarega, Ukhta District". The Circuit Court considered that the above elements had served to prove that

the claimant had been clearly identifiable and that the applicant company had not provided evidence to refute them, thus failing to prove that the disseminated statements had concerned a legal entity other than the claimant.

31. The Circuit Court reiterated its judgment of 28 February 2007 (see paragraph 25 above) quashing the Appellate Court's judgment of 30 November 2006 (see paragraph 21 above) as regards the applicant company's line of argument based on section 57(3) of the Media Act, without considering that argument afresh. It observed that the Komi branch of the FCPS had not provided the defendant with official information regarding the inquiry into the complaint about mercury poisoning and noted that the defendant had not provided proof to the effect that the impugned statements had concerned a third party, and not the claimant.

32. The Circuit Court declared the statements contained in the three impugned news items untruthful and tarnishing of the claimant's business reputation. It ordered Regnum to publish a retraction and remove the three news items from the website. It awarded the claimant RUB 1,000,000 (28,425 euros¹ (EUR)) in compensation for non-pecuniary damage and ordered the defendant to reimburse the claimant RUB 1,000 (EUR 28.42) in court fees.

V. SUBSEQUENT EVENTS

33. An application lodged by the applicant company for a supervisory review was rejected on 19 December 2007.

34. On 27 December 2007 the applicant company transferred to the bailiffs service's bank account RUB 1,001,000 (EUR 28,102²) in voluntary execution of the judgment of 10 October 2007.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

35. Article 29 of the Constitution of the Russian Federation guarantees freedom of thought and expression, and freedom of the media. Its paragraph 3 states that no one may be forced to express his or her opinions and convictions or to reject them.

36. Article 152 of the Civil Code of the Russian Federation provides that an individual may apply to a court with a request for the correction of statements (*сведения*) that are damaging to his or her honour, dignity or business reputation if the person who disseminated such statements does not

¹ The amounts in euros in this paragraph are calculated using the exchange rate applicable on 10 October 2007, that is, RUB 35,18 to one euro.

² This amount is calculated using the exchange rate applicable on 27 December 2007, that is, RUB 35,62 to one euro.

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 provisions of this Article concerning the protection of the right to business reputation of an individual are applicable to the protection of such right of a legal entity.

37. Article 270 §§ 4 and 5 of the Code of Commercial Procedure as in force at the material time provided, in particular, that an appellate commercial court should quash a first-instance judgment if the case materials contained no transcript of the first-instance hearing and that it should hear the case anew under the rules applicable to the proceedings before a first-instance court.

38. The Media Act (Law of the Russian Federation N 2124-1 on Media Outlets of 27 December 1991, with amendments, as in force at the material time) provided, in so far as relevant, as follows. A media outlet (*средство массовой информации*) was defined as a periodic print publication, radio, television, or video programme, documentary film programme, or other forms of outlet for periodic dissemination of information (section 2). The provisions of the Media Act governing periodic print publications were applicable to other forms of periodic dissemination of texts created with the use of a computer and/or stored in databases (section 24). The editorial board of a media outlet, or its editor-in-chief, or a journalist bore no responsibility for the dissemination of untruthful statements tarnishing the honour and dignity of citizens and organisations, or harming the health and/or development of children, or representing an abuse of the freedom of mass information and/or the rights of a journalist, in particular, where such statements had formed part of the response [by State authorities] to a request for information or of the materials of press services of State authorities, organisations, institutions, enterprises, and bodies of public associations (section 57(3)) or if such information is a verbatim reproduction of official statements by officials of State bodies, organisations or public associations (section 57 (4)).

39. Resolution no. 3 of the Plenary Supreme Court of the Russian Federation of 24 February 2005 (section 7) defines “untruthful statements” as allegations of facts or events which have not taken place in reality at the time the statements are disseminated. Statements contained in court decisions, decisions by investigative bodies and other official documents amenable to appeal cannot be considered untruthful. Statements alleging that a person has breached the law, committed a dishonest act, behaved unethically or broken rules of business etiquette tarnish that person’s honour, dignity and business reputation. Where untruthful tarnishing statements have been disseminated through an Internet website registered as a media outlet in accordance with the law, the domestic courts should examine defamation claims arising from such statements in accordance with the legal norms governing media outlets. Resolution no. 3 (section 9)

requires courts hearing defamation claims to distinguish between statements of fact, which can be checked for their veracity, and value 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 their veracity.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

40. The applicant company complained that the judgment of 10 October 2007 constituted a disproportionate interference with its right to freedom of expression guaranteed by Article 10 of the Convention, which reads in so far as relevant 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. ...

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. Admissibility

41. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The Government

42. Accepting that the defamation proceedings before the commercial courts constituted an interference with the applicant company's right to freedom of expression, the Government asserted that the interference in question was “prescribed by law”, namely by Article 152 of the Civil Code, pursued the legitimate aim of protecting the reputation of others, and was “necessary in a democratic society”.

43. Noting that members of the press had to exercise their right to freedom of expression “in accordance with the ethics of journalism” and should not overstep the limits of acceptable criticism, the Government

observed that the domestic commercial courts had established that (a) the applicant company had disseminated untruthful statements concerning the detection of mercury in the branded drink, given that there had been no documentary proof that mercury had been detected; (b) the investigative authorities had refused to open criminal proceedings in connection with the alleged detection of mercury on 19 December 2005; and (c) the news item of 23 November 2005 had contained detailed information regarding the suspect batch of the branded drink. In view of the above, the Circuit Court had concluded that the producer of the suspect batch of the branded drink had been clearly identifiable to a consumer and, accordingly, found that the impugned statements had tarnished the claimant's business reputation. It had observed that Regnum had not been in possession of information that could prove (a) that JSC RMK had broken relevant laws and regulations; (b) that JSC RMK had produced low-quality foods; (c) that there had been instances of contamination of foods through JSC RMK's fault; and (d) that there had been instances of harm to consumers' health or pecuniary interests caused by the foods produced by JSC RMK. The Circuit Court had found, accordingly, that the defendant had not proved the truthfulness of the disseminated statements.

44. The Government thus asserted that the interference with the applicant company's right to freedom of expression had corresponded to a "pressing social need" and had been supported by "relevant and sufficient reasons".

45. The Government contended that the impugned statements amounted to statements of fact lacking a factual basis, not value judgments of a journalist. The defendant had not produced any evidence before the domestic courts proving the truthfulness of the impugned statements alleging that JSC RMK had been unscrupulous in its business activities. The Circuit Court had "found an objective negative sense component concerning the claimant" in the impugned news items.

46. The Government further submitted that "the imposed penalty [had been] proportionate to the offence" and that the amount awarded to the claimant had been compatible "with the requirements of reasonableness and fairness".

(b) The applicant company

47. Accepting that the interference with their right to freedom of expression had been "in accordance with the law" and pursued the legitimate aim of protecting the reputation of others, the applicant company insisted that it had not been "necessary in a democratic society".

48. The impugned news items had pursued the aim of reporting on a matter of serious public concern and had not been intended to tarnish the claimant's business reputation. The Moscow and Appellate Courts had on three occasions agreed with the defendant that the impugned statements had

not directly concerned the claimant. Nevertheless, the Circuit Court, sitting as a court of final instance, had decided that they had contained allegations of unscrupulous business practices on the part of JSC RMK, even though that company had not been the sole producer of the drink marketed under the “Lyubimyy Sad” brand. The Circuit Court had not provided relevant and sufficient reasons to explain its departure from the approach adopted by the Moscow and Appellate Courts and had failed to balance the claimant’s right to reputation against the general public’s right to be informed of potential health hazards and the right to freedom of the press.

49. Regnum had acted in good faith and respected the standards of journalism required for presenting information on a matter of public concern in a balanced and nuanced manner. At the time of publication, the information agency had been persuaded of the truthfulness of the information obtained from the State authorities.

50. In the course of the defamation proceedings, the defendant had taken every reasonable effort to submit ample evidence that the disseminated statements had been based on information obtained from State authorities, such as the Komi branch of the FCPS and the UVD, which had been available when the impugned news items had been published. Telegrams sent by the UVD had confirmed that a woman had been admitted to hospital and diagnosed with mercury poisoning, and that cartons of the branded drink had been seized from shops and wholesalers. The fact that the document of 22 November 2005 signed by Mr K. had been addressed to the heads of local branches of the FCSP and not to the applicant company had not rendered the contents of the document untruthful. Mr K. himself had confirmed the authenticity of the document before the Appellate Court. Yet the Circuit Court had considered that the information that mercury had been found in a carton of the branded drink had not been confirmed by evidence, referring to the refusal to open criminal proceedings of 19 December 2005.

51. The Circuit Court had ordered the defendant to retract statements that had not appeared in the impugned news items, as the latter had not contained any statements to the effect that JSC RMK had broken the law or had been responsible for foreign objects appearing in cartons of drink.

52. The Circuit Court had not applied the standards regarding freedom of the press established in the Court’s case-law according to which members of the press were not obliged to verify the truthfulness of reports by State authorities. The applicant company had resorted to methods of objective and balanced reporting when quoting from the letter of 22 November 2005. The Appellate Court had correctly applied section 57(3) of the Media Act corresponding to the Court’s case-law. Yet the Circuit Court had dismissed the applicant company’s argument merely because the letter in question had not been an official response to a request for information. Such a rigid and formalistic approach to evidence had imposed an excessive burden on the applicant company. The Circuit Court’s findings had been poorly reasoned

and had taken into account information available in retrospect, not at the time of publication.

53. The amount awarded to the claimant had been excessive and disproportionate to the alleged damage to its business reputation. It had imposed a significant financial burden on the applicant company and had had a “chilling effect” on its freedom of expression.

54. In sum, the applicant company insisted that the Circuit Court’s judgment of 10 October 2007 had been in breach of Article 10 of the Convention.

2. The Court’s assessment

55. The Court observes that in its judgment of 10 October 2007, the Circuit Court found that three news items published on the website owned by the applicant company had tarnished the business reputation of a private commercial company, and made a sizeable award to the latter (see paragraph 29 above). It notes that it is common ground between the parties that the judgment in question constituted an interference with the applicant company’s right to freedom of expression guaranteed by Article 10 § 1 of the Convention. The Court is satisfied that the interference in question was “prescribed by law”, notably Article 152 of the Civil Code, and pursued a legitimate aim, that is, “the protection of the reputation or rights of others”, within the meaning of Article 10 § 2 of the Convention.

56. The Court will now consider whether the interference with the applicant company’s right to freedom of expression was “necessary in a democratic society”. In doing so, it will have to ascertain whether the interference in question was proportionate to the legitimate aim pursued, and whether the grounds given by the domestic courts were relevant and sufficient (see *Morice v. France* [GC], no. 29369/10, § 144, ECHR 2015). The core question for the Court to answer is whether the Circuit Court struck a fair balance between an electronic media outlet’s right to freedom of expression and a commercial company’s right to reputation.

(a) General principles

(i) Freedom of expression

57. The Court recapitulates the general principles regarding Article 10 of the Convention, which have been firmly established in its case-law, as follows.

58. Freedom of expression, set forth in Article 10 of the Convention, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. It is subject to exceptions, which must be construed strictly, and the need for which must be established convincingly. The adjective “necessary” within the meaning of Article 10 § 2 implies the existence of a

“pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, which goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a “restriction” is reconcilable with freedom of expression as protected by Article 10. The Court’s task is not to take the place of the competent national authorities, but to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This supervision is not limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith. The Court has to consider the interference complained of in the light of the case as a whole and determine whether it was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and that they relied on an acceptable assessment of the relevant facts (for further details and references see *Morice*, cited above, § 124; *Bédat v. Switzerland* [GC], no. 56925/08, § 48, 29 March 2016; and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 75, 27 June 2017).

59. There is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression, in particular, in matters of public interest: a high level of protection of this freedom, with the authorities having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern such a matter (see, with further references, *Morice*, cited above, § 125). The nature and severity of the sanctions imposed are among the factors to be taken into account when assessing the proportionality of the interference. Interference with freedom of expression may have a chilling effect on the exercise of that freedom (see, with further references, *Baka v. Hungary* [GC], no. 20261/12, §§ 159-60, 23 June 2016).

(ii) *Freedom of expression and electronic media*

60. The Court has long held that the press plays an essential role in a democratic society (see, among many other authorities, *De Haes and Gijssels v. Belgium*, 24 February 1997, § 37, *Reports of Judgments and Decisions* 1997-I, and *Bédat*, cited above, § 50). Following the advent of new information technology, it expanded the guarantees of press freedom to the new electronic media (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 132, ECHR 2015). In doing so, it acknowledged that, in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information in general.

At the same time, the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press (*ibid.*, §133; see also *Arnarson v. Iceland*, no. 58781/13, § 37, 13 June 2017, and *Magyar Jeti Zrt v. Hungary*, no. 11257/16, § 66, 4 December 2018).

61. Although the media must not overstep certain bounds, their duty is nevertheless to impart – in a manner consistent with their obligations and responsibilities – information and ideas on all matters of public interest. Not only do the media have the task of imparting such information and ideas, the public also has a right to receive them (see, with further references, *Pentikäinen v. Finland* [GC], no. 11882/10, § 88, ECHR 2015). Were it otherwise, the press – and hence the electronic media – would be unable to play their vital role as “public watchdog” (see, *mutatis mutandis*, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 165, 8 November 2016). The task of imparting information necessarily includes, however, “duties and responsibilities” (see *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 125, 27 June 2017). The protection afforded to journalists by Article 10 of the Convention is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism (see *Bédat*, cited above, § 50). 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 v. Switzerland* [GC], no. 69698/01, § 104, ECHR 2007-V).

(iii) *Balancing the right to freedom of expression against the right to reputation*

62. The right to protection of reputation is guaranteed by Article 8 of the Convention as part of the right to respect for private life. The concept of “private life” is a broad term that is not susceptible to exhaustive definition; it also covers a person’s physical and psychological integrity. In order for Article 8 to come into play, however, an attack on a person’s reputation must attain a certain level of seriousness and be carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Medžlis Islamske Zajednice Brčko and Others*, cited above, § 76).

63. When it is called upon to adjudicate on a conflict between two rights which enjoy equal protection under the Convention, the Court must weigh up the competing interests. The outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the offending article or under Article 10 of the Convention by the author of that article because these two rights deserve, in principle, equal respect (see *Bédat*, cited above § 52). The principles relevant in the context of balancing

the competing rights which must guide the Court's assessment – and, more importantly, that of the domestic courts – of the necessity of the interference complained of have thus far been defined as: whether the publication contributed to a debate of public interest; the degree of notoriety of the person affected; the subject of the news report; the prior conduct of the person concerned; the content, form and consequences of the publication; and, where it arises, the circumstances in which photographs were taken. Where it examines an application lodged under Article 10, the Court will also examine the way in which the information was obtained and its veracity as well as the gravity of the penalty imposed on the journalists or publishers (see *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 165).

(b) Application of these principles to the present case

(i) Parties to the defamation proceedings

64. The Court will begin by considering the respective positions of the parties to the domestic proceedings at hand.

65. The applicant company against which JSC RMK brought defamation proceedings is an electronic media outlet registered under Russian law. It follows that the principles governing freedom of the media recapitulated in paragraphs 60 to 61 above are directly applicable to the present case.

66. Noting the claimant's position as a commercial company, the Court observes that it has previously accepted that a private company's interest in protecting its reputation through defamation proceedings may correspond to the wider economic good and that, accordingly, the State enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth of allegations which risk harming its reputation (see *Steel and Morris v. the United Kingdom*, no. 68416/01, § 94, ECHR 2005-II, and *Uj v. Hungary*, no. 23954/10, § 22, 19 July 2011). At the same time, the Court emphasises that there is a difference between the reputational interests of a legal entity and the reputation of an individual as a member of society. Whereas the latter may have repercussions on one's dignity, the former are devoid of that moral dimension (see, in the context of defamation proceedings brought by public authorities, *Margulev v. Russia*, no. 15449/09, § 45, 8 October 2019).

(ii) Criteria to be considered when balancing the right to freedom of the media against the right to reputation of a commercial company

67. The Court observes that the claimant who brought the defamation proceedings against the applicant company in issue was a commercial company. It considers that this fact has to be taken into account when deciding on which principles established in its case-law are pertinent in the context of balancing competing Convention rights against each other. In the Court's view, the following criteria are relevant in the assessment of the

necessity of an interference where the right to freedom of the media is to be weighed against the competing right to reputation of a commercial company: the subject matter of the impugned publications, that is, whether they concerned a matter of public interest; the content, form and consequences of the publications; the way in which the information was obtained and its veracity; and the gravity of the penalty imposed on the media outlet or journalists (see, *mutatis mutandis*, *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 165).

(α) Matter of public interest

68. The Court observes that the subject matter of the three impugned news items at hand was the instance of mercury poisoning following the consumption of a shop-bought branded soft drink. In its view, this clearly pertains to an important aspect of human health and raises a serious issue in terms of consumer protection. Accordingly, the impugned news items conveyed information of considerable public interest (compare *Bergens Tidende and Others v. Norway*, no. 26132/95, § 51, ECHR 2000-IV, and *Haldimann and Others v. Switzerland*, no. 21830/09, § 56, ECHR 2015).

69. However, nowhere in the judgment of 10 October 2007 did the Circuit Court consider whether the information disseminated by an electronic media outlet had been topical to the public. It therefore failed to see the defamation dispute in the context of the general interest in receiving reports on the discovery of a potential health hazard.

(β) Content, form and consequences of the publication

70. As to the content and form of the publication, the Court observes that the three news items (see paragraphs 8, 9 and 12 above) were short and purely informational. Phrased as statements of facts, they contained no subjective appraisal of the situation reported on by a journalist that could be regarded as a value judgment. Reiterating that statements of fact, unlike value judgments, should be susceptible of proof (see, among other authorities, *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 76, ECHR 2004-XI, and *Cheltsova v. Russia*, no. 44294/06, § 80, 13 June 2017), the Court will discuss the existence of such proof as regards the impugned news items in paragraphs 72 to 76 below.

71. The Court is not in a position to consider whether the consequences stemming from the impugned news items that the claimant had sustained, if any, called for the measures applied by the Circuit Court, including the award of damages in the amount of RUB 1,000,000, in view of the fact that the judgment of 10 October 2007 did not discuss whether the impugned news items had affected the claimant, or its stock holders, in any manner, be it in terms of a decline in sales, the valuation of the stock, or otherwise

(compare *Feldek v. Slovakia*, no. 29032/95, § 87, ECHR 2001-VIII). Yet it cannot but take note of such an omission on the part of the Circuit Court.

(γ) Sources of the information published and its veracity

72. As to the manner in which the information was obtained and its veracity, the Court observes the following. The impugned news items of 21 and 22 November 2005 reported on the activities of the police and MCE units (see paragraphs 8 and 9 above) and that of 23 November 2005 reproduced verbatim the communiqué by the State consumer protection service (see paragraphs 11 and 12 above). The thrust of the impugned news items was not primarily to accuse a commercial company of committing offences or morally reprehensible acts, but to pass on the authorities' message on a public health issue (compare *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 63, ECHR 1999-III). That the applicant company relied on the information gathered from official sources may not be held against it, as members of the media should be entitled to do so without having to undertake independent research (*ibid.*, § 68, and *Colombani and Others v. France*, no. 51279/99, § 65, ECHR 2002-V). If this were not the case, the efficacy of Article 10 of the Convention would to a large degree be lost (see *Selistö v. Finland*, no. 56767/00, § 60, 16 November 2004).

73. Nevertheless, the Circuit Court did not absolve the applicant company of responsibility pursuant to section 57(3) of the Media Act, which provided for exemption where impugned untruthful statements originated from official sources (see paragraph 38 above), even though it expressly referred to the official documents of the UVD, naming them as the source of the disseminated information (see paragraph 30 above).

74. Furthermore, the Circuit Court refused to consider the FCPS's letter of 22 November 2005 (see paragraph 11 above) as an "official" source of information. The Court finds it perplexing that, even though Mr K. had confirmed the authenticity of the letter of 22 November 2005 before the Appellate Court (see paragraph 21 above), the Circuit Court paid no attention to his testimony. There is no indication in the judgment of 10 October 2007 as to whether Mr K. was considered an unreliable or unconvincing witness. Instead, the Circuit Court focused on the fact that the letter in question had not been in response to an official request for information from the applicant company (see paragraph 31 above). The Court considers that to require the applicant company to prove the truthfulness of statements copied from the FCPS's letter, while at the same time disregarding, or giving no reasons for rejecting, the evidence presented by the applicant company to establish the authenticity of their source of information, is not consistent with the requirements of Article 10 of the Convention (see, for similar reasoning, *Novaya Gazeta v Voronezhe*

v. Russia, no. 27570/03, § 56, 21 December 2010, and *Aquilina and Others v. Malta*, no. 28040/08, § 49, 14 June 2011).

75. It is noteworthy that the Circuit Court referred to the refusal to open criminal proceedings of 19 December 2005 when considering the news items published on the website between 21 and 23 November 2005 (see paragraph 31 above). The Court cannot but note that such reasoning defies temporal logic, as at the time of the publication of the news items the applicant company had no means of envisaging the events that would occur almost a month later. It reiterates that the extent to which an applicant can reasonably regard a source of information as reliable is to be determined in the light of the situation as it presented itself to the applicant at the material time, rather than with the benefit of hindsight (see *Soltész v. Slovakia*, no. 11867/09, § 49, 22 October 2013).

76. Accordingly, the Court considers that the information reported in the three news items which the Circuit Court found defamatory amounts to statements of fact, the existence of which at the time of reporting had been demonstrated. Mindful of the fact that, as the issues in the present case concerned factual statements, it is of great importance that the duties and responsibilities of the media were respected (see *Selistö*, cited above, § 55), and in view of the manner in which the information related in the three news items was obtained, the Court is satisfied that, when publishing on the website, the applicant company acted in discharge of their duty as purveyors of accurate and reliable information and in full compliance with the tenets of responsible journalism (see, for similar reasoning, *Nadtoka v. Russia (no. 2)*, no. 29097/08, §§ 48-49, 8 October 2019).

(δ) Penalty imposed on the applicant company

77. As for the gravity of the penalty imposed on the applicant company, the Court notes the sizeable award made to the claimant, which, in the applicant company's submission, had a "chilling effect" on their freedom of expression (see paragraph 53 above). It reiterates that the most careful scrutiny on its part is called for when the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the media in debates over matters of legitimate public concern (see *Bladet Tromsø and Stensaas*, cited above, § 64).

78. In the Court's view, when faced with the task of balancing the reputational interests of a commercial company against the general interests of society in protecting public health and in being informed of potential health hazards, as well as the corresponding interest (and duty) of members of the media in reporting on such hazards, domestic courts ought to demonstrate convincingly the existence of a pressing social need capable of justifying an interference with freedom of the media.

79. However, the Circuit Court, finding for the claimant, did not advance any arguments as to why it had accorded more weight to the

reputational interests of a commercial company than to the interest of the general public to be informed of such a serious matter as an instance of mercury poisoning through commercially distributed foods. Nor did the Circuit Court make any assessment, however perfunctory, of the proportionality of the sizeable amount claimed by the commercial company in respect of non-pecuniary damage to the alleged damage to its business reputation, thus disregarding the requirement under the Convention that an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered (see *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 49, Series A no. 316-B, and *Steel and Morris*, cited above, § 96). The Court thus considers that the Circuit Court did not provide “relevant and sufficient reasons” to justify the award of RUB 1,000,000 in compensation for the alleged damage to the reputation of a commercial company.

(iii) Conclusion

80. In view of the above elements, the Court considers that the Circuit Court failed to establish convincingly and in conformity with the principles embodied in Article 10 of the Convention that there had been a pressing social need for the interference complained of. The Circuit Court’s judgment of 10 October 2007 thus amounted to a disproportionate interference with the applicant company’s right to freedom of expression that was not “necessary in a democratic society” within the meaning of Article 10 § 2 of the Convention.

81. There has accordingly been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

1. Pecuniary damage

83. In their claims for just satisfaction of 25 May 2018, the applicant company claimed, under the head of costs and expenses, compensation for a

total of 1,943,712.54 Russian roubles (RUB) (26,996³ euros (EUR)), that is, RUB 1,000,000 (EUR 13,889) for the amount it had paid to the claimant in execution of the judgment of 10 October 2007; RUB 1,000 (EUR 13,88) for the cost of court fees; and an amount in compensation for inflation for ten years and four months (the applicant company provided detailed calculations in this respect). The Court considers that these claims, which are directly connected to the execution of the judgment of 10 October 2007, fall to be examined under the head of pecuniary damage.

84. The Government argued that “bringing the applicant [company] to liability [had been] lawful and substantiated” and considered the claims “unfounded and speculative”.

85. The Court observes that it is not disputed between the parties that in execution of the judgment of 10 October 2007 the applicant company paid RUB 1,001,000 (see paragraph 34 above). The equivalent of this sum in euros was, at the material time, EUR 28,102. The Court emphasises that the payment was in execution of the final and binding judgment of 10 October 2007 which it has found, in paragraph 80 above, to have been a disproportionate interference with the applicant company’s right to freedom of expression in breach of Article 10 of the Convention.

86. The Court reiterates that a judgment in which it finds a breach of a Convention provision imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 32, ECHR 2000-XI). Claims in respect of pecuniary damage and costs and expenses, unlike those in respect of non-pecuniary damage, are made on the basis of a precise calculation and require conversion into euros before an award can be made (see *Shukurov v. Azerbaijan*, no. 37614/11, § 32, 27 October 2016).

87. The applicant company submitted their claims in respect of non-pecuniary damage in Russian roubles having factored in indexation for the depreciation of the rouble over the course of ten years. The Court notes the drastic difference in the Russian rouble-to-euro exchange rates applicable, respectively, on the date of the voluntary execution of the judgment against the applicant company and the date on which the just satisfaction claims were submitted (see paragraphs 34 and 92 above). Indeed, the euro equivalent of RUB 1,001,000 at the exchange rate applicable on 27 December 2007, that is, EUR 28,102, is more than double the euro equivalent of the same sum at the exchange rate applicable on 25 May 2018, when the applicant company submitted their claims for just satisfaction, that is, EUR 13,889.

³ The amounts in euros in this paragraph are calculated using the exchange rate set on 25 May 2018, the date of submission of the applicant company’s just satisfaction claims, that is, 72 Russian roubles to one euro.

88. Reiterating that the reparation awarded by the Court should aim at putting the applicant company in the position in which it would have found itself had the violation not occurred (see *Žáková v. the Czech Republic* (just satisfaction), no. 2000/09, § 33, 6 April 2017), considering the fact that the euro equivalent of the amount claimed to cover the award paid in Russian roubles together with indexation, that is, EUR 26,996, is lower than the euro equivalent of the amount paid on 27 December 2007, that is, EUR 28,102, and having regard to the documents in its possession, the Court considers it reasonable to award the applicant company, in respect of pecuniary damage, the sum of EUR 26,996, plus any tax that may be chargeable.

2. Non-pecuniary damage

89. The applicant company claimed EUR 10,000 in respect of non-pecuniary damage.

90. The Government insisted that the applicant company's rights had not been violated and considered the amount claimed excessive.

91. The Court awards the applicant the amount claimed in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

92. The applicant company made no claims for the costs and expenses incurred before the domestic courts and the Court. The Court, accordingly, makes no award under this head.

C. Default interest

93. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

- (i) EUR 26,996 (twenty-six thousand nine hundred and ninety-six euros), plus any tax that may be chargeable, in respect of pecuniary damage;
- (ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points.

Done in English, and notified in writing on 8 September 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Paul Lemmens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Serghides and Dedov are annexed to this judgment.

P.L.
M.B.

CONCURRING OPINION OF JUDGE SERGHIDES

1. The applicant company complained before the Court that a domestic judgment of 10 October 2007 had constituted a disproportionate interference with its right to freedom of expression guaranteed by Article 10 of the Convention. The applicant is a media outlet company which reported information disseminated by the local police and the State consumer protection agency regarding mercury poisoning following consumption of a branded juice-based drink. As indicated in the introduction to the judgment, drinks marketed under the brand in question were produced by at least two legal entities, one of which (the “claimant”) brought defamation proceedings against the applicant company before the commercial courts. The lower commercial courts dismissed the claims, but the highest commercial court hearing a cassation appeal brought by the claimant, the Federal Commercial Court of the Moscow Circuit (the “Circuit Court”), found against the applicant company and ordered it to pay the claimant an award of 1,000,000 roubles (28,428 euros) in compensation for non-pecuniary damage (see paragraph 32 of the judgment).

2. I agree with the judgment (paragraph 81) in finding a violation of Article 10 of the Convention and I also agree with all the remaining points of the operative part of the judgment. I would, however, have used a different methodology to reach the same conclusion.

3. Let me start by saying that the judgment concerns the resolution of a conflict between two private rights, namely, the right to freedom of expression of the applicant under Article 10 of the Convention and the right to the private life/reputation of the claimant under Article 8.

4. In resolving this conflict, the judgment uses four criteria for the purpose of weighing up the two rights. These criteria are referred to in a general manner in paragraph 63 of the judgment and in a more specific manner in paragraph 67. In the latter, it is pertinently stated as follows:

“In the Court’s view, the following criteria are relevant in the assessment of the necessity of an interference where the right to freedom of the media is to be weighed against the competing right to reputation of a commercial company: the subject matter of the impugned publications, that is, whether they concerned a matter of public interest; the content, form and consequences of the publications; the way in which the information was obtained and its veracity; and the gravity of the penalty imposed on the media outlet or journalists ...”

5. Subsequently, the judgment examines these four criteria separately (see paragraphs 68-79), and, lastly, it concludes that in view of these “elements” (criteria), the Circuit Court failed to establish that there had been a pressing need for the interference complained of, and that, consequently, the Circuit Court’s judgment amounted to a disproportionate interference with the applicant’s right to freedom of expression, that was not “necessary

in a democratic society”, within the meaning of Article 10 § 2 of the Convention (see paragraphs 80-81).

6. In the very recent case of *Rashkin v. Russia* (no. 69575/10, 7 July 2020, not yet final), I have proposed in my dissenting opinion (§§ 6-15) a method for resolving a conflict between a right under Article 10 and a right under Article 8, by first determining the damage or impairment that each right will potentially sustain in the conflict, and, then, by weighing in the balance the damage that each of the two rights would potentially suffer. I suggested that a victim-centred test would in essence be the same as a damage-centred test. I based my proposal on a harmonious blending of the principle of effectiveness with the principle of proportionality (see §§ 9-10 of the said opinion). After finishing my opinion in *Rashkin* and while writing this opinion, I discovered that the use of the “impact criterion”, with nuances between different authors, in resolving a conflict of rights has received considerable academic support (see, for instance, Stijn Smet, “Conflict Between Human Rights and ECtHR – Towards a Structural Balancing Test”, in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights – Conflict or Harmony?*, Oxford, 2017, 38, at p. 46 et seq., where reference is made to Robert Alexy’s treatise, namely, *A Theory of Constitutional Rights*, Oxford, 2002, at pp. 44-48; Stijn Smet, *Resolving Conflicts Between Human Rights – The Judge’s Dilemma*, London-New York, 2017, at pp. 144, 152-162; and Aharon Barak, *Proportionality: Constitutional Rights and their Limitations*, Cambridge, 2012, at p. 89 et seq.).

The originality of this opinion, like the one I appended to *Rashkin*, in resolving a conflict of rights lies: (a) in using the principle of effectiveness as a norm of international law in determining the extent of damage that each of the competing rights will suffer from the conflict; (b) in using the principle of effectiveness as a method of interpretation which seeks to find the best interpretative approach or methodology in resolving a conflict of rights, namely through the harmonious employment of the principle of effectiveness as a norm and the principle of proportionality (see § 10 of my opinion in *Rashkin*). In my view, the conflict of rights is in most cases resolved since only the core or very essence of one of the rights will be affected by the conflict and here the principle of effectiveness intervenes as a norm to assist in ascertaining whether and when the core of the right is affected.

7. By following the above approach in the present case, I come to the same conclusion as the judgment, since I find that the damage that the right to freedom of expression would suffer from this conflict would be more considerable than the damage to the claimant’s right to respect for its private life; more precisely, only the core or very essence of the first right, but not also of the latter, would be damaged by the conflict.

8. My difference in relation to the judgment is basically threefold: (a) the judgment does not follow my damage-based approach; (b) I am using the four criteria/considerations that the judgment uses with the focus on determining the extent of damage that each of the two conflicting rights would suffer if the other were to prevail; and (c) unlike the judgment, I always keep clear in my mind that the only conflict that has to be resolved is that between the two competing rights. Regarding (c) above, the following example may be given to explain what I mean. In paragraph 79 of the judgment it is stated that “the Circuit Court, finding for the claimant, did not advance any arguments as to why it had accorded more weight to the reputational interest of a commercial company than to the interest of the general public to be informed of such a serious matter as an instance of mercury poisoning through commercially distributed foods”. However, in my humble opinion, the “public interest” criterion should not be used, or be perceived to be used, as a right in itself to be weighed against the claimant’s right to the protection of private life under Article 8. There are not three rights to be weighed in the balance in the present case, but only two rights, namely, that of the applicant under Article 10 and that of the claimant under Article 8. In my view, the interest of the public to be informed is an element or criterion which concerns mainly the individual right to freedom of expression, because this is the means through which the public can be informed, for example, about a potential health hazard. In the present case, one can say that informing the public about such a hazard was the object and the main purpose of the exercise of the applicant’s right. Thus, to prevent a right from being exercised and from fulfilling its object and main purpose would affect its very core or essence. It is to be noted here that the applicant relied on information gathered from official sources (see paragraph 72).

9. In my humble view, the examination of the relevant criteria in making a fair balance test (see paragraphs 67-79) does not itself serve to resolve a conflict of rights if ultimately there is: (a) no determination or finding of the extent of damage that each right will suffer from the conflict (if the other right is to prevail), and (b) no weighing up of the two rights as regards the potential damage caused to each one. I respectfully highlight that these are omissions in the present judgment, as in that of the Circuit Court at domestic level. Neither judgment has carried out a full or appropriate balancing exercise. A fair balance test, however, by its very nature, can never be partial or lacking in some important elements. It is a process involving different steps or phases, which can either be fulfilled or not (see § 6 of the joint concurring opinion of Judges Elósegui and Serghides in *Nadtoka v. Russia (no. 2)*, no. 29097/08, 8 October 2019). This is especially significant when the Court is dealing with two rights which are mutually exclusive and where the restrictive measure, appearing as a limitation under paragraph 2 of Article 10 or Article 8, is an individual right in itself.

10. I am of the view that without a diligent review of where the greater damage would lie, and without a proper weighing-up of the damage to the two conflicting rights, one cannot resolve the conflict arising in the present case.

11. In the present instance, the omission of an appropriate or full balancing exercise has not led to a wrong outcome. However, without diligently weighing up the possible damage to each of the two rights at stake, one may run the risk of setting a precedent which would disproportionately favour one right over another.

12. For this reason, I propose the damage-centred or victim-focused methodology, which I believe takes into account the two conflicting rights on an equal footing, since Article 10 and Article 8, in principle, deserve equal respect. On the equal status and the consequent enjoyment of equal protection of the two rights enjoyed, the Court in *Bédat v. Switzerland* ([GC], no. 56925/08, § 52, 29 March 2016) pertinently held:

“52. Furthermore, when it is called upon to adjudicate on a conflict between two rights which enjoy equal protection under the Convention, the Court must weigh up the competing interests. The outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the offending article or under Article 10 of the Convention by the author of that article, because these two rights deserve, in principle, equal respect.”

(see, similarly, *Hachette Filipacchi Associés (ICI PARIS) v. France*, no. 12268/03, § 41, 23 July 2009; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011; and *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 91, ECHR 2015).

13. The proposed test focuses on the damage or consequence that the clash of rights will bring, comparing which right will be the winning one and consequently which “victim” in the scenario will sustain more damage. I conceive that if the core of a right is impaired, as was that of the applicant company in the present case, compared to the damage sustained by the claimant company whose core right has remained intact with only a non-essential aspect being negatively affected, the applicant company’s right should prevail (see also § 12 of the dissenting opinion of Judge Serghides in *Rashkin v. Russia*, cited above). It must be acknowledged that there is a difference between the reputational interest of a legal entity and the reputation of an individual as a member of society. Whereas the latter may have repercussions on a person’s dignity, the former is devoid of that moral dimension (see paragraph 66 of the judgment and *Margulev v. Russia*, no. 15449/09, § 45, 9 October 2019).

To my mind, the principle of effectiveness requires that greater protection should be given to the victim, who suffers more damage as a

result of the conflict of rights, and is therefore in a weaker or more vulnerable situation (see, in *Rashkin*, above-cited dissenting opinion, § 12).

14. Accordingly, in the present case I am of the view that the core of Article 10 has been impaired since the applicant company was ordered to pay to the claimant a sizeable award as a result of exercising its freedom of expression, namely for disseminating a statement in which it voiced concerns about public health, a belief which it reasonably based upon a document obtained from State authorities. In comparison, the claimant's right to the protection of its reputation, although still negatively affected by the dissemination of the information, would not suffer damage to as great a degree as the applicant's right to freedom of expression would suffer as a result of the Circuit Court's judgment, or as the same right would suffer if the dissemination of information were to be trumped by the right to reputation.

15. In view of the above, I find that there has been a violation of Article 10 of the Convention.

CONCURRING STATEMENT BY JUDGE DEDOV

I am surprised by the calculation method chosen by the Court in awarding pecuniary damage (see paragraphs 87 and 88 of the judgment), which is quite unusual. It would have been more appropriate to follow the proposal made by the applicant company, based on an official inflation rate. This latter approach would have been consistent with the case-law of the Court (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 258, ECHR 2006-V) and was not contested by the Government. In the end the Court reached the same result.