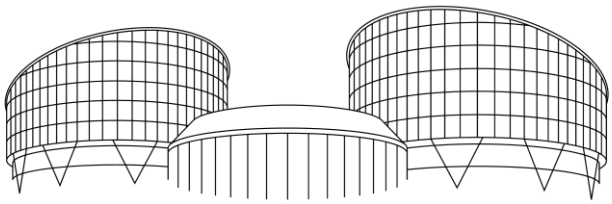

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

**CASE OF GAZETA UKRAINA-TSENTR v. UKRAINE**

*(Application no. 16695/04)*

JUDGMENT

STRASBOURG

15 July 2010

**FINAL**

*15/10/2010*

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

**In the case of** Gazeta Ukraina-Tsentr v. Ukraine**,**

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

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska, *judges,*

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 22 June 2010,

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

# PROCEDURE

1. The case originated in an application (no. 16695/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian company, Gazeta Ukraina-Tsentr ("the applicant company"), on 1 January 2004.

2. The applicant company was represented by Ms L. Opryshko and Ms L. Pankratova, lawyers practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev, from the Ministry of Justice.

3. On 2 March 2009 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

4. The applicant company is the editorial body of a limited liability company called the Ukraina-Tsentr Newspaper and is registered in the city of Kirovograd, Ukraine.

5. In June 2002 the mayoral elections were conducted in the city of Kirovograd. On 12 June 2002, during the election campaign, two press conferences relating to those elections were held at the Ukrainian

Independent News Agency ("the UNIAN"). During one of those press conferences, a local Kirovograd journalist, Mr M. accused one of the candidates, Mr Y., of ordering him to be murdered for 5,000 US dollars (USD). The wording of the accusation made by Mr M., as later established by the domestic courts, contained the following paragraph:

> "He (Mr Y.) went to his friend, the one locally known politician, whom I will not name yet, but if necessary we will provide [his name], we have facts. Upon his request, the other took out five thousand dollars of his money and handed it to his head of security service and said the following, that it is necessary to reserve for me a place in the morgue.
>
> So, at present, they "ordered" me for five thousand dollars. Who ordered? I say: [Mr] Y. [full name], I declare it officially."

6. This information among other news was disseminated by the UNIAN via e-mail and posted on its website. According to the applicant company, it received this information by electronic mail in the following form:

> "Furthermore, [Mr] M. accused the Kirovograd mayoral candidate and President of the Kirovskiy District Court, [Mr] V. Y., "of ordering him to be murdered". The journalist reported that for safety reasons he had taken his family away from the region. According to him, all four journalists participating in the press conference addressed the General Prosecutor's Office, the Security Service of Ukraine and the Ministry of the Interior concerning the threats to them and claimed that they had proof of pressure being applied to them".

7. According to the applicant company, on the same day, the STB TV channel in its Vikna-Novyny news programme disseminated similar information, indicating that Mr M. had also mentioned the sum of USD 5,000 for "ordering him to be murdered".

8. On 14 June 2002 the applicant company published an article which was titled "The metropolitan tour" in which the above-mentioned press conferences of 12 June 2002 were described. Among other things, the article contained the following paragraph:

> "[Mr] M. accused [Mr] Y. of 'ordering him to be murdered' and even stated the amount paid for the 'order' – 5,000 US dollars. The journalist stated that for safety reasons he had taken his family away from the region. According to him, all four journalists participating in the press conference addressed the General Prosecutor's Office, the Security Service of Ukraine and the Ministry of the Interior concerning the threats to them. He also claimed that they had proof of the pressure being applied to them."

9. In August 2002 Mr Y. lodged a civil claim in the Kirovograd Leninsky District Court (the Leninsky Court) against the applicant company and Mr M. complaining that the phrase "[Mr] M. accused [Mr] Y. 'of ordering him to be murdered' and even stated the amount paid for the 'order' – 5,000 US dollars" published by the applicant company was untrue and abased his human dignity. He maintained that that publication had affected his professional and private life and damaged his reputation as an

individual, lawyer and politician. Taking the view that the publishing of a correction would not be sufficient, he asked the courts to pay him non-pecuniary damages. Later, Mr Y. supplemented his claim by asking for the statement made by Mr M. during the press conference (see paragraph 5 above) to be found untrue and defamatory.

10. According to the applicant company, its co-defendant, Mr M., asked the court to adjourn the proceedings and on 30 November 2002 asked the Supreme Court to transfer the case to another court. The applicant company supported those requests. In his request to the Supreme Court, Mr M. noted in particular that the plaintiff was the President of the Kirovograd Kirovskiy Local Court and therefore, to ensure the objective and unbiased examination of the case, he asked for the case to be transferred to one of the local courts in Kyiv, the city in which the press conference had taken place. By letter dated 12 December 2002, the Deputy President of the Supreme Court allowed the request in part and ordered the case to be transferred to the Kamyansky Local Court in the Cherkassy region. However, by that time, the Leninsky Court had already examined the case (see the next paragraph), having rejected Mr M.'s request for the case to be adjourned.

11. On 10 December 2002 the Leninsky Court, in a single judge formation (Judge B.) found that the accusations made by Mr M. and the applicant company that Mr Y. had ordered Mr M. to be murdered were contrary to the principle of the presumption of innocence guaranteed by the Constitution. The defendants did not prove before the court that the disseminated information was true. The court found the following phrase from the applicant company's article "[Mr] M. accused [Mr] V. Y. 'of ordering him to be murdered' and noted the amount paid for the 'order' – 5,000 US dollars" untrue and defamatory. The court also found that Mr M. had accused Mr Y. of 'ordering' him to be murdered for USD 5,000 during the press conference and that such accusation was also untrue and defamatory. The court noted that, in view of the fact that the two bodies had not drawn up a formal contract between them, the applicant company could not prove that it had received the impugned information officially from the UNIAN. Furthermore, the information published by the applicant company did not correspond to the information disseminated by the UNIAN. For those reasons, the court concluded that the applicant company could not be protected against liability. The applicant company and Mr M. were ordered to pay Ukrainian hryvnias 100,000 (UAH) and UAH 20,000, respectively, in compensation. The court, however, found no liability against the UNIAN, which had been identified as a co-defendant by the court, because the plaintiff had lodged no claims against it and the UNIAN had published a correction.

12. The applicant company appealed against the decision of the first-instance court. It complained, in particular, that Judge B. could not be impartial because Mr Y. was the chairman of the regional council of judges

and the deputy chairman of the regional branch of the Union of Lawyers and, as a judge and a lawyer, Judge B. was dependent upon the plaintiff. The applicant company further noted that the court had disregarded the fact that the impugned information had been circulated by electronic mail, had also been freely accessible on the UNIAN website and that such information belonged in the public domain. It also submitted that the plaintiff had not asked it to correct the material and its proposal to publish a correction before the judicial proceedings and during the judicial proceedings had been refused by the plaintiff.

13. On 12 March 2003 the Kirovograd Regional Court of Appeal upheld the decision of the first-instance court but decreased the compensation award. The applicant company was ordered to pay UAH 50,000 in compensation.

14. The applicant company appealed in cassation.

15. On 2 October 2003 the Supreme Court upheld the decisions of the lower courts.

16. On 30 October 2003 the applicant company paid the compensation awarded against it and UAH 2,500 in enforcement fees.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Legislation concerning the independence of the judiciary

*The Judicial System Act, 2002*

17. Relevant provisions of the Act read as follows:

**Section 97**

**Disciplinary proceedings against judges**

"1. Disciplinary proceedings shall be regarded as the procedure of consideration by the body, specified by the law, of a statement regarding the breaking of judicial status, official duties or the oath by a judge.

2. The right to initiate disciplinary proceedings against a judge shall belong to the following persons: ... the chairman of a relevant council of judges...

3. It is forbidden to abuse the right specified in paragraph 2 of this section. In particular, it is forbidden to initiate consideration of an issue concerning the legal liability of a judge without sound reasons or to use the said right to exert pressure upon a judge in connection with the administration of justice by such a judge..."

**Section 111**

**The councils of judges**

"1. Within the period between the conferences of judges the functions of a judicial self-government shall be performed by a relevant council of judges.

2. A council of judges shall elect from among its members the chairman, deputy chairman and secretary of a council of judges. Chairmen and deputy chairmen of the courts of appeal and higher courts, head of the military chamber of the Court of Appeal of Ukraine and head of the military chamber of the Court of Cassation of Ukraine shall not be elected to the post of chairman of a relevant council of judges.

3. Within the period between the conferences of judges a council of judges shall provide for execution of the decisions taken by a conference and control over their observance, also decide on convocation of the next conference. The powers and operation of a council of judges shall be specified by this Act and the regulations of a council of judges approved by a conference of judges.

4. A council of judges shall:

1) exercise control over the operation of relevant courts and relevant departments of the State judicial administration, hear progress reports of chairmen of these courts and officials of the State judicial administration;

2) consider the issues of legal and social protection of judges, provision of consumer and household services for judges and their families, and take the decisions to this effect;

3) consider the issues concerning the appointment of judges to administrative posts in courts in the manner prescribed by this law;

4) hear the reports of members of relevant judicial boards of experts concerning their work on these boards;

5) submit the proposals on operation of relevant courts for consideration of the State bodies and local self-government authorities;

6) hear, at least once a year, the information of the State judicial administration of Ukraine on support of operation of the courts of general jurisdiction.

7) take other decisions falling within the limits of its power.

5. The decisions taken by a council of judges shall be binding for the judges holding the administrative posts in relevant courts. A decision of a council of judges may be cancelled only by a conference of judges and suspended by the decision of the Council of Judges of Ukraine."

## B. Legislation concerning defamation proceedings

### *1. Constitution of Ukraine*

18. Relevant extracts from the Constitution read as follows:

**Article 32**

"... Everyone is guaranteed judicial protection of the right to have corrected misinformation communicated about himself or herself or members of his or her family, and of the right to demand that any type of material be corrected, and also the right to compensation for pecuniary or non-pecuniary damage inflicted by the collection, storage, use and dissemination of such misinformation."

**Article 34**

"Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.

Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice.

The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crime, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or maintaining the authority and impartiality of justice."

**Article 62**

"A person is presumed innocent and shall not be subjected to criminal conviction unless proved guilty through a legal process which establishes a guilty verdict.

No one is obliged to prove that he or she is innocent of committing a crime.

An accusation shall not be based on illegally obtained evidence or assumptions. All doubts in regard to the proof of guilt are interpreted in the accussed's favour.

In the event that a court verdict is revoked, the State shall, as determined, provide pecuniary or non-pecuniary damage."

### *2. Civil Code of 1963*

19. Relevant extracts from the Civil Code read as follows:

**Article 7**

**Protection of honour, dignity and reputation**

"A citizen or an organisation shall be entitled to demand in a court of law that material be corrected if it is not true or is set out untruthfully, degrades their honour and dignity or reputation, or causes damage to their interests, unless the person who disseminated the information proves that it is truthful.

... information disseminated about a citizen or an organisation that does not conform to the truth and causes damage to their interests, honour, dignity or reputation shall be subject to rectification, and pecuniary and non-pecuniary damage can be recovered. A limitation period of one year shall apply to claims concerning rectification of such data and compensation."

### *3. Printed Media (Press) Act*

20. Relevant extracts from the Printed Media (Press) Act provide:

**Section 26**

**The rights and obligations of journalists**

"... A journalist is obliged to:

... 2) provide objective and truthful information for publication; ..."

**Section 37**

**Correction of material**

"Citizens, legal entities and State bodies and their legal representatives have the right to demand correction of material published about them or data that does not correspond to the truth or defames their honour and dignity.

If the editorial board does not have any evidence that the information published by it corresponds to the truth, it has to correct this material at the request of the plaintiff in the next issue of the printed media or to publish a correction on its own initiative. ..."

**Section 42**

**Exemption from liability**

"The editorial board and journalists are not liable for the publication of information that is untrue, defames the honour and dignity of citizens and organisations, infringes their rights and lawful interests or constitutes abuse of the freedom of activity of the media and the rights of journalists if:

1) this information was received from the news agencies or from the media owner (co-owners);

2) the information contains responses to a formal request for access to official documents or to a request for written or oral information, provided in accordance with the Data Act;

3) the information is a verbatim reproduction of any official address of the officials of State bodies, organisations and the citizens' unions;

4) the information is a verbatim reproduction of materials published by other printed media which refer to that information;

5) the information contains secrets that are specifically protected by law, but the journalist received this information lawfully."

### *4. News Agencies Act, 1995*

21. The relevant extract of the Act provides as follows:

**Section 30**

**Relationships between news agencies and distributors/owners (users) of a means of communication**

"The basis of a relationship between a news agency and distributor/owner (user) of a means of communication shall be in the form of a contract.

A distributor/owner (user) of a means of communication enters into a contract with the news agency if the latter has a State registration certificate."

### *5. Resolution No. 7 of the Plenary Supreme Court of 28 September 1990 "on the Application of the Legislation Regulating the Protection of the Honour, Dignity and Business Reputation of Citizens and Organisations"*

22. The relevant extract from Resolution No. 7 reads as follows:

"... 17. In accordance with Article 7 of the Civil Code, the defendant [in a defamation case] has to prove that the information disseminated by him corresponds to the truth. The plaintiff only has the obligation to prove that the defendant has disseminated defamatory information about him. The plaintiff also has a right to provide evidence of the untruthfulness of such information."

## C. Other materials

23. The applicant company submitted extracts from reports published in Ukraine by the NGO, the International Foundation "Centre for Judicial Studies". The reports titled "Monitoring of Judicial Independence in Ukraine (2007)" and "Monitoring of Judicial Independence in Ukraine. (2008)" provided, *inter alia*, that among the forms of pressure [being put] on judges were threats to 'complicate a career' and to 'initiate dismissal or

disciplinary proceedings'. According to the same reports, councils of judges had been rated the third most influential body on judges because they could affect the professional career of a judge.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

24. The applicant company complained that the first-instance and appellate courts were not independent and impartial because Mr Y., the plaintiff in the proceedings, was the chairman of the Kirovograd Regional Council of Judges and could influence any judge in the region. It relied on Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

### A. Admissibility

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

### B. Merits

26. The applicant company maintained that there was a big problem with the independence of the judiciary in Ukraine. They referred to the Court findings in the case of Sovtransavto (see *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 80, ECHR 2002-VII) in which the Court found that the interventions coming from the executive branch of the State revealed a lack of respect for judicial office itself. The applicant company also submitted reports written in 2007 and 2008 by the NGO the Centre for Judicial Studies on the subject of the monitoring of judicial independence. It concluded that among the forms of pressure being put on judges were threats to 'complicate a career' and to 'initiate dismissal or disciplinary proceedings'. According to the same reports, councils of judges had been rated the third most influential body on judges because they could affect the career of a judge.

27. With reference to the domestic law, the Government maintained that the judiciary in Ukraine enjoyed institutional and financial independence. They considered that, being the chairman of a collective body – the council

of judges - the plaintiff in the impugned proceedings had had no influence on decisions taken by the first-instance and appellate courts.

28. According to the Court's constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, *inter alia*, *Fey v. Austria*, 24 February 1993, §§ 27, 28 and 30, Series A no. 255, and *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII). It must be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar v. the United Kingdom*, 10 June 1996, § 38, *Reports of Judgments and Decisions* 1996-III).

29. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (*Wettstein*, cited above, § 43).

30. In the instant case, the Court is not convinced that there are sufficient elements to establish that any personal bias was shown by the judges of the first-instance and appellate courts, who sat in the applicant company's case. In any event, the Court does not consider it necessary to rule on that question because it has arrived at the conclusion, for the reasons set out below, that there was a lack of objective impartiality.

31. As to the objective test, it must be determined whether, quite apart from the conduct of the judges in the present case, there are ascertainable facts which may raise doubts as to their impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Wettstein*, cited above, § 44, and *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 58, *Reports of Judgments and Decisions* 1996-III).

32. In this respect even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86). What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Wettstein v. Switzerland*, loc. cit., and *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports of Judgments and Decisions* 1998-VIII).

33. The Court notes that the parties made a number of comments on the general situation concerning the institutional and financial independence of the judiciary in Ukraine. The Court finds those general comments of no relevance to the present case because the principal issue is not the

independence of judges from other branches of power or third parties but the issue of the independence of judges within the judicial system itself and the risks that judges could be influenced by their colleagues.

34. The Court notes that the plaintiff in the present case held the position of chairman of the regional council of judges. Despite the Government's arguments that a council of judges is a collective body, the domestic legislation seems to empower the chairman of such a council to initiate disciplinary proceedings against other judges. The applicant company submitted material about the monitoring of judicial independence, which demonstrates the possible risk that judges could be influenced through a threat of disciplinary proceedings and other career-related decisions which are within the competence of the chairman of a council of judges. Therefore, the applicant company could reasonably anticipate a possible conflict of interest in the domestic proceedings in question. Furthermore, the Deputy President of the Supreme Court allowed the request of the defendants in part, although he had not, as asked, transferred the case to a court in Kyiv, but had transferred it to a first-instance court in another region of Ukraine. Although this decision by the Deputy President of the Supreme Court did not state clearly the reasons for the transfer, it suggested that the applicant company's fear about a risk of bias of the courts in the Kirovograd region was not without substance. Therefore, in the Court's view, the applicant company's fears that judges of first-instance and appellate courts lacked impartiality can be held to be objectively justified. Moreover, the higher courts, in dealing with the applicant company's appeals, disregarded its submissions to this effect.

35. There has accordingly been a violation of Article 6 § 1 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

36. The applicant company complained that the interference with its freedom of speech was not in accordance with law and was disproportionate and unnecessary in a democratic society. It relied on Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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

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

## B. Merits

### *1. The arguments of the parties*

#### a. The applicant company

38. The applicant company noted that there had been a legal basis for the interference. However, it considered that the domestic courts had failed to properly examine the fact that it was the UNIAN which had disseminated the information. The domestic courts had essentially relied on the fact that there had been no formal written agreement between the UNIAN and the applicant company and therefore the fact of disseminating news to the applicant company could not be proven. In its opinion, such an approach by the domestic courts had not been based on the law. The applicant company also criticised the domestic law for not ensuring that the media was exempted from liability for disseminating statements made by third parties who, while acting unofficially, nevertheless reported socially important information. It also noted that section 42 of the Printed Media (Press) Act requires that statements made by third parties must be quoted verbatim. Accurate but not literally quoted statements would not provide exemption from liability. They concluded that the shortcomings of the domestic legislation together with the failure of the domestic courts to apply the standards of the Court had led to a situation in which it had been punished financially for the accurate reiteration of a statement made about a politician by a third party in the context of public debate.

39. The applicant company noted that the domestic courts had recognised the fact that Mr M. had publicly accused Mr Y. of ordering him to be murdered for USD 5,000 and that that information had been disseminated even prior to the applicant company's impugned publication. In such circumstances it was not important that the representative of the applicant company had not been present at the press conference and that the source of information had not been mentioned. Furthermore, the mentioning of the amount in its publication had not affected the nature of the accusation

made by Mr M. The applicant company stressed that it had not accused Mr Y. of carrying out any illegal activities but had only disseminated information of significant public interest which it had received from a third party within the context of the election debates. With reference to the case of *Gongadze v. Ukraine* (no. 34056/02, ECHR 2005-XI), it also noted that Mr M. was a journalist and that it was dangerous for journalists to criticise politicians in Ukraine. It considered that its punishment for the accurate reiteration of information that had already been made public was inappropriate and disproportionate to the aim of protecting the reputation of Mr Y.

40. The applicant company noted that the domestic courts had not differentiated between Mr M., who had made an accusation against Mr Y., and the applicant company, which had merely reported the accusation without adding any comments. However, the domestic courts had asked them to prove the truthfulness of the accusation made by a third person.

41. It also noted that the domestic courts had considered the plaintiff as academician and judge and completely disregarded the fact that he had acted as a politician in the mayoral elections. The publication had nothing to do with the private life of the plaintiff or his academic and judicial activities and was part of a political debate on elections which presupposed wider limits of criticism. The applicant company further noted that the compensation it had been ordered to pay for defamation was one of the biggest of its kind in the judicial practice of Ukraine and had forced it to reduce its staff and circulation.

**b. The Government**

42. The Government maintained that the interference with the applicant company's freedom of expression had been in accordance with law, as it had been based on the clear and foreseeable provisions of the Constitution, the Civil Code, the Printed Media (Press) Act, and the News Agencies Act.

43. The Government noted that the contested article was published by the applicant company during the mayoral elections in which Mr Y. was one of the main candidates. Therefore, there had been an important public interest in holding fair elections. Furthermore, the domestic courts had been protecting the rights and reputation of Mr Y. which was not only a permissible ground for interference under the second paragraph of Article 10 of the Convention but also protected one of the rights guaranteed by Article 8.

44. The Government stressed the great impact of information during the electoral process and noted that the applicant company had disseminated information, obtained from unknown sources, accusing Mr Y. of ordering murder. They noted that the applicant company had failed to prove at the domestic level that it had paid a subscription to receive news from the UNIAN. Furthermore, it did not follow the exact wording of the statement

by Mr M. Therefore, it could not be exempted from liability under section 42 of the Printed Media (Press) Act. The Government also noted that the applicant company had stated the amount of the alleged order for Mr M. to be murdered, which had not been mentioned in the information disseminated by the UNIAN. In their opinion, such level of detail clearly brought the information disseminated by the applicant company into the category of an accusation of a serious crime based on concrete facts, while no criminal investigations had been conducted against Mr Y. at the time of publication. They concluded that the interference was necessary for the protection of the reputation and rights of others as stipulated in the second paragraph of Article 10.

45. As to the proportionality of the interference, the Government considered that the amount of damages awarded against the applicant company by the first-instance court - UAH 100,000, had been excessive and disproportionate, but this lack of proportionality had been corrected by the appellate court which had reduced the amount to UAH 50,000 taking into account the fact that the applicant company was a regional newspaper. The latter amount appeared reasonable to the Government, because this sum had not led to the bankruptcy of the applicant company and it had continued its activities afterwards.

*2. The Court's assessment*

**a. General principles**

46. The Court reiterates the following fundamental principles in this area:

(a) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the remarks held against the applicant company and the context in which he made them. In particular, it must determine whether the interference at issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see *Barfod v. Denmark*, 22 February 1989, § 28, Series A no. 149). 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, moreover, that they based themselves on an acceptable assessment of the relevant facts (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298).

(b) An interference with a person's freedom of expression entails a violation of Article 10 of the Convention if it does not fall within one of the exceptions provided for in paragraph 2 of that Article. The Court therefore has to examine in turn whether such interference was "prescribed by law", whether it had an aim or aims that is or are legitimate under Article 10 § 2 and whether it was "necessary in a democratic society" for the aforesaid aim

or aims (see *Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 45, Series A no. 30).

(c) 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, but it goes hand in hand with a 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 (see *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I).

(d) The press plays an essential role in a democratic society. Although it must not overstep certain bounds, regarding, in particular, protection of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, including those relating to justice. Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Perna v. Italy* [GC], no. 48898/99, § 39, 6 May 2003, with further references).

(e) There is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV). Moreover, the limits of acceptable criticism are wider as regards a public figure, such as a politician, than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his words and deeds by journalists and the public at large, and he must consequently display a greater degree of tolerance (see *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103, or *Incal v. Turkey*, 9 June 1998, § 54, *Reports of Judgments and Decisions* 1998-IV).

(f) Article 10 of the Convention protects journalists' right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism. Under the terms of paragraph 2 of Article 10 of the Convention, freedom of expression carries with it "duties and responsibilities", which also apply to the media even with respect to matters of serious public concern. Moreover, these "duties and responsibilities" are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the "rights of others" (see *Lindon, Otchakovsky-Laurens and July v. France*

[GC], nos. 21279/02 and 36448/02, § 67, ECHR 2007-..., and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 78, ECHR 2004-XI).

(g) News reporting based on interviews or reproducing the statements of others, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog" (see, for instance, *The Observer and The Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216). In such cases, a distinction needs to be made according to whether the statements emanate from the journalist or are quotations from others, since punishment of a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so (see *Pedersen and Baadsgaard*, cited above, § 77; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 65, Series A no. 239; and *Jersild*, cited above, § 35).

**b. Application of the aforementioned principles to the instant case**

*i. Whether there was interference*

47. The Court considers, as agreed by the parties, that the decisions of the domestic courts and the award of damages made against the applicant company amounted to "interference by [a] public authority" with the applicant company's right to freedom of expression under the first paragraph of Article 10. Such interference will entail a violation of Article 10 unless it is "prescribed by law", has an aim or aims that are legitimate under paragraph 2 of the Article and is "necessary in a democratic society" to achieve such an aim or aims.

*ii. Whether the measure was prescribed by law and pursued a legitimate aim*

48. The Court notes that the interference complained of had a legal basis, namely, Article 7 of the Civil Code (see paragraph 19 above). It considers that this provision is both accessible and foreseeable in its application. As to the law governing the exemption of the media from liability (see paragraph 20 above), the Court considers that the applicant company's arguments mostly related to the interpretation and application of law by the domestic courts, which issue will be more appropriately dealt with below, under the proportionality limb of its analysis.

49. The Court notes that the interference served the legitimate aim of "the protection of the reputation or rights of others". It therefore remains to be examined whether the interference was "necessary in a democratic society".

*iii. "Necessary in a democratic society"*

50. In the instant case, the applicant company was ordered to pay non-pecuniary damage for publishing untrue and defamatory statements against Mr Y. The publication in question reported on the accusations made by Mr M. against Mr Y. during the press conference devoted to the mayoral elections in Kirovograd. The domestic courts found the applicant company and Mr M. jointly guilty of accusing Mr. Y of a serious crime. The courts also refused to exempt the applicant company from liability for disseminating untrue and defamatory information. The courts' reasoning was that the applicant company did not have a formal contract with the UNIAN news agency and had not proved that the published information had come from official sources.

51. The Court notes that the allegations made by Mr M. were very serious. The applicant company reported on the fact that this accusation had been made in the context of the widely debated issue of the mayoral elections in Kirovograd. Furthermore, the vulnerability of political journalists in itself was a topic of important public interest, given that, as the Court found in the case of *Gongadze*, journalists who cover politically sensitive topics place themselves in a vulnerable position *vis-à-vis* those in power (as evidenced by the death of eighteen journalists in Ukraine since 1991) (see *Gongadze v. Ukraine*, cited above, § 168).

52. The Court relies on the domestic courts' findings which demonstrate that the applicant company accurately reported on the intervention of Mr M. during the press conference without distorting it. Furthermore, the applicant company presented the information in a neutral manner, without adding their own commentary or undue emphasis, in the context of a wider report on the press conferences related to the mayoral elections in Kirovograd. The domestic courts, however, failed to distinguish between the accusation made by Mr M. and the reporting on such accusation by the applicant company and found them jointly and equally liable for the statement that did not emanate from the applicant company but was clearly identified as that proffered by another person. The domestic courts thus failed to explain whether the defamation ascribed to the applicant company lay in the contents of the reported accusation, or in the fact that the applicant company had made it (see paragraph 11 above). The Court notes that the domestic law exempts the media from liability under certain conditions where they have published untrue information. It is not, however, clear why this issue had been so extensively discussed by the domestic courts in the present case because they had themselves established that the information as disseminated by the applicant company was true.

53. The Court finds no evidence that the domestic courts in their judgments performed the balancing exercise between the need to protect the reputation of Mr Y. and the applicant company's right to divulge information of public interest in the context of election debates. They did

not provide sufficient reasons for putting Mr M. who had made a defamatory statement and the applicant company, who had reported about it, on equal footing and for disregarding the fact that the impugned information had been widely disseminated prior to the publication by the applicant company. Neither did they discuss the proportionality of the interference and the fact that the applicant company had offered to the plaintiff the possibility to reply to the impugned publication.

54. In such circumstances, the Court considers that the Ukrainian courts interfered with the applicant company's right to freedom of expression in a manner which was not necessary in a democratic society.

55. Accordingly, the Court concludes that there was a breach of Article 10 of the Convention.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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

57. The applicant company claimed 9,675.57 euros (EUR) in respect of pecuniary damage, which comprised the amount paid by it to the plaintiff in the defamation proceedings plus the enforcement fee charged on it together with the amount of inflation losses. It also claimed EUR 20,000 in respect of non-pecuniary damage, contending that the above-mentioned fine had caused financial difficulty, which had led to the resignation of journalists, a price increase and a decrease in its circulation.

58. The Government maintained that there was no causal link between the alleged violations and the pecuniary damage claimed by the applicant company, given that no violation of Article 1 of Protocol No. 1 had been alleged in the present case. They disagreed with the applicant company's calculation of inflation losses, considering it to be general and not supported by any documents. As to non-pecuniary damage, the Government noted that the applicant company was an economic entity and its claim for non-pecuniary damage was unsubstantiated.

59. The Court is satisfied that there is a causal link between the pecuniary damage claimed and the violation of the Convention found above. The applicant company, however, have submitted no official documents to confirm the accuracy of their calculations as to the inflation losses claimed. The Court therefore awards the applicant company EUR 8,400 which

corresponded to UAH 52,500, the amount paid in October 2003 by the applicant company under the judgment of 10 December 2002. It rejects the remainder of the applicant company's claim for pecuniary damage. Furthermore, with due regard to the size of the applicant company and its local status, on one hand, and the amount of the compensation against it, on the other hand, as well as the chilling effect of the defamatory proceedings against it, the Court finds that the circumstances of the present case call for an award of non-pecuniary damage to the applicant company**.** Acting on equitable basis, the Court awards it EUR 5,000 in respect of non-pecuniary damage.

### B. Costs and expenses

60. The applicant company also claimed EUR 870 for the costs and expenses incurred before the Court.

61. The Government maintained that those claims were not sufficiently detailed. Furthermore, the applicant company submitted no confirmation that it had actually paid the expenses for translation.

62. According to the Court's case-law, an applicant company is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 830 covering costs for the proceedings before the Court.

### C. Default interest

63. The Court considers it appropriate that the default interest 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 6 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 10 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant company, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,400 (eight thousand four hundred euros) in respect of pecuniary damage, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage and EUR 830 (eight hundred thirty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant company, to be converted into Ukrainian hryvnias at the rate applicable on the date of settlement;

(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;

5. *Dismisses* the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 15 July 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President