



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

FOURTH SECTION

**CASE OF EDITORIAL BOARD OF *GRIVNA* NEWSPAPER  
v. UKRAINE**

*(Applications nos. 41214/08 and 49440/08)*

JUDGMENT

STRASBOURG

16 April 2019

*This judgment will become final in the circumstances set out in Article 44 à 2 of the Convention. It may be subject to editorial revision.*



**In the case of Editorial Board of *Grivna* Newspaper v. Ukraine,**

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

Jon Fridrik Kjølbro, *President*,

Faris Vehabović,

Egidijus Kūris,

Carlo Ranzoni,

Marko Bošnjak,

Péter Paczolay, *judges*,

Sergiy Goncharenko, *ad hoc judge*,

and Marialena Tsirli, *Section Registrar*,

Having deliberated in private on 26 March 2019,

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

## PROCEDURE

1. The case originated in two applications (nos. 41214/08 and 49440/08) 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, Editorial Board of *Grivna* Newspaper (“the applicant company”), on 18 June 2008 and 9 September 2008 respectively.

2. The applicant company was represented by Mr O.D. Ivanyuta, a lawyer practising in Kherson. The Ukrainian Government (“the Government”) were represented by their Agent, Mr I. Lishchyna.

3. The applicant company alleged, in particular, that the judge of the first-instance court which had decided its case (in application no. 49440/08) lacked impartiality and that that court had not been a “tribunal established by law” for the purposes of Article 6 § 1 of the Convention. It further alleged that the domestic courts’ decisions concerning two articles it had published had breached its freedom of expression (Article 10 of the Convention).

4. On 15 May 2017 notice of the above complaints was given to the Government and the remainder of the applications was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. As Ms Ganna Yudkivska, the judge elected in respect of Ukraine, was unable to sit in the case (Rule 28 of the Rules of Court), the Vice-President of the Section decided to appoint Mr Sergiy Goncharenko to sit as an *ad hoc* judge (Rule 29 § 1(a)).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

#### A. Background

6. The applicant, Editorial Board of *Grivna* Newspaper, is a Ukrainian single shareholder company which has its registered offices in Kherson. *Grivna* is a regional newspaper published in that city (hereinafter “the newspaper”).

7. In 2006 the newspaper published two articles containing negative statements about Mr I., who from 1996 to 2012 was President of the Kherson Regional Court of Appeal. The articles gave rise to defamation proceedings, which are the subject of the present case. The translation of the relevant parts of the articles is given below. The passages which were the subject of the domestic proceedings are underlined and numbered for reference. The parts of the articles rephrased and summarised by the Court are presented in square brackets. Where initials are used, the actual articles contained I.’s full name: his first name, surname and/or patronymic in various combinations.

8. In January 2006 the plenary Verkhovna Rada of Ukraine (hereinafter “the Parliament”) was to examine the question of I.’s appointment to the position of judge on a permanent basis, until retirement age. The matter was to be examined because I.’s previous ten-year appointment was expiring (see the relevant constitutional and legislative rules concerning the appointment of judges at paragraph 52 below).

9. Prior to the Parliament’s session, on 5 January 2006 another regional newspaper, *Vgoru*, published an article alerting the readers that the matter of I.’s permanent appointment would be examined by Parliament and urging readers to send comments on I.’s candidature to the relevant parliamentary committee.

#### B. Article A – application no. 49440/08

##### *1. Publication*

10. On 12 January 2006 Parliament examined the question of I.’s permanent appointment. Owing to concerns raised by some Members of Parliament about I.’s candidature (see the summary of the transcript of the debate at paragraph 13 below), Parliament decided to adjourn the examination of the question.

11. An article, published in the issue of the newspaper dated 19-26 January 2006, was dedicated to the above event and entitled

“Purgatory for Judges” (*Чистилище для судей*). It spread over two full pages. The first page of the article contained the following text:

“We often criticise Members of Parliament, and for good reason. But this gathering of people with different views and business interests under the same roof sometimes produces unpredictable decisions. Perhaps it is too soon to call this ‘democracy’. However, the fact that the MPs have ‘rejected the advances’ of the President of the Kherson Court of Appeal, Mr I. (получил от народных депутатов «гарбуза») [A1] speaks volumes.

So let us talk about justice in the Kherson Region and first of all about its President Mr I. Below we publish a transcript of the proceedings of Parliament concerning... appointment of judges for life. On 12 January 2006 many Kherson residents watched live this sitting of Parliament and our Mr I. was the main hero of that ‘show’ [A2]. We have been writing about him much lately. Other publications have been writing even more. We will provide our readers with a brief reminder about Mr I. based only on our own publications which, by the way, have not been challenged. [We] are also in possession of a number of incontrovertible documents.

We give you this in lieu of a prologue: ‘... In his eight years and counting at the head of the Regional Court I. has found himself dozens of loyal people – lawyers, judges, and important businessmen – for whose personal and business interests he has successfully lobbied through favourable judicial decisions [A3] (*обзавелся десятками преданных людей... чей бизнес и личные интересы успешно лоббировал с помощью нужных решений в судах*)...

Here is the conclusion: I. is considered the person in charge and untouchable [A4] in the Kherson Region where 14 governors succeeded each other in 10 years... If one removes him successfully, even if peacefully, the people will believe in changes for the better in the pervasively corrupt judicial system...’

This document arrived in our offices last autumn. It was addressed to a very high-ranking and influential official in the capital in response to his request for information from Kherson. But the first official documents had appeared right after I. took up his position and they corroborate the above-mentioned reasoning. Here is just a short quote from the letter by members of the regional council to the President of the Supreme Court dated 17.02.1998:

‘Using his position I. received 100,000 US Dollars from G. who has been released from serving his sentence and confiscation of his assets. He thus helped G. avoid his liabilities *vis-à-vis* his... creditors.’

They go on to describe I.’s ‘tricks’ (проделки) on two pages! [A5] And here is the response of the Supreme Court’s President to the above-quoted episode: [there followed a quote from a letter of the President of the Supreme Court stating that in April 1998 I. had been reprimanded for a breach of professional ethics by the Qualifications Commission of Judges].

So I. has been ‘duly punished’ at the very dawn of his career. It appears that the lesson did him good since our offices have no information about the highest judge of the region receiving any subsequent reprimands. A new person became the Supreme Court’s President soon afterwards and I. could feel more confident. Perhaps his relative at the Supreme Court helped to make it so [A6]. A relative so influential that he is now awaiting his appointment to the Constitutional Court...

...

And now I.'s 10-year term as judge is coming to an end. New laws provide for lifetime appointment by a majority vote in Parliament. And here our President 'has made himself famous' nationwide ('прославился' на всю страну). [A7] [The article then mentioned Judge O., whose resignation was discussed at the same plenary sitting of Parliament as I.'s appointment] But Mr I. is a 'hard nut to crack' and is dreaming of keeping his post no matter what ('крепкий орешек' и, несмотря ни на что, он мечтает сохранить пост). [A8]"

12. The first page of the article also contained extensive quotes from articles previously published in February, April and May 2005 in the same newspaper, in particular one dated 28 April 2005 which discussed assets allegedly belonging to I. and his relatives. That article contained quotes from a letter of the chairman of the Council of Judges dated 8 April 2005. The letter contained an acknowledgement that Judge D., President of the Civil Division of the Supreme Court, was the father-in-law of I.'s son.

13. Almost the entire second page of the article was taken up by the verbatim reproduction of the transcript of Parliament's plenary sitting of 12 January 2006 at which Parliament examined questions about the appointment and resignation of a number of judges. According to the transcript, several MPs said that they had received complaints about the situation in the Kherson Region's courts. I. denied any wrongdoing and stated that all complaints had been checked by the appropriate authorities and found baseless. The head of the relevant parliamentary committee stated that the committee had also conducted an inquiry into complaints raised about I. and found them to be groundless. He also implied that I. might have been a victim of a slander campaign orchestrated by aggrieved litigants. However, in view of the concerns raised by several MPs, I.'s candidature was withdrawn for additional checks. A brief discussion followed concerning Judge O., from one of the district courts of the Kherson Region, who had presented her resignation to Parliament. One of the MPs made a speech to the effect that Judge O. had resigned to avoid responsibility for bribery.

14. The newspaper's reproduction of the transcript was followed by the following conclusion:

"As you can see, dear readers, representatives of the Kherson justice system have 'distinguished themselves' twice. It was not only Mr I. who disgraced himself in front of the entire country [A9] but also his subordinate from one of the district courts."

15. Mr I.'s photograph was displayed on the first page of the article, covering approximately one sixth of the page. He was shown in formal attire, with a neutral facial expression, apparently sitting at a desk. Under the photograph the following caption appeared:

"I will recompense them according to their deeds (Old Testament)<sup>1</sup>

Mr I. is shown in the photo"

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1. Jeremiah 25:14, King James Bible.

16. In the same issue of the newspaper another photograph of I. was published with the caption “Parliament so far has not given a ‘life sentence’ to the president of the Kherson Court of Appeal”. The copy of the article provided to the Court by the applicant company does not contain that second photograph.

17. Within the next two weeks other newspapers published at least three articles commenting in critical terms on the Parliamentary session dedicated to I.’s appointment and his activities in general.

## *2. Domestic proceedings*

18. I. brought a claim in the Kherson Suvorovsky District Court against the applicant company seeking retraction of statements A1-A9 and compensation for non-pecuniary damage. He argued that the publication in the newspaper, which had a circulation of 62,500, had negatively influenced his professional reputation and public opinion of the judicial system at large, triggering actions aimed at putting pressure on the courts, namely numerous demonstrations outside the region’s courthouses.

19. The case was tried by Judge S. (trial judge).

20. According to the applicant company, in the course of the trial it produced, by way of proof of the factual grounds for the impugned statements, twenty-five articles published in the local newspapers from 1997 to 2006.

21. On 16 April 2006 the applicant company lodged an application with the Supreme Court urging it to reassign the case, in view of the plaintiff’s position, to a court in a different region (see paragraph 42 below for the relevant domestic legal provision). It argued, in particular, that the trial judge had previously examined a claim lodged by I.’s son, himself a vice president of a district court in Kherson, and had allegedly breached the law in those proceedings. It also argued that, as a long-term president of the Kherson Regional Court of Appeal, I. had supervisory functions in respect of all judges in the region.

22. On 28 April 2006 the applicant company asked the first-instance court to postpone hearings in the case until the Supreme Court had ruled on its reassignment application. I. objected. The court decided not to postpone the hearings.

23. On 19 May 2006 the applicant company asked the court to suspend proceedings in the case under Article 201 of the Code of Civil Procedure (see paragraph 43 below) pending examination by the Supreme Court of its application for case reassignment. The court refused. The applicant company challenged the trial judge on the grounds that he had rejected its request to suspend the proceedings. The judge rejected the challenge.

24. On 22 May 2006 the first-instance court delivered its judgment allowing the claim.

(i) The court declared: (a) the photographs and captions to them and statements A1-A5 and A7-A9 baseless, insulting and damaging to I.'s reputation, and (b) statement A6 untrue and damaging to I.'s reputation.

(ii) The court ordered the applicant company to publish its judgment and awarded I. 100,000 Ukrainian hryvnyas (UAH) in compensation for non-pecuniary damage and UAH 5,000 in court fees (about 14,860 euros and 740 euros (EUR) respectively at the time).

(iii) By way of reasoning the court stated that statements A1-A5 and A7-A9 could not be protected as value judgments, since they were deliberately insulting. Article 10 § 2 of the Convention permitted restrictions on freedom of expression for the protection of the reputation of others. Neither the transcript of Parliament's plenary sitting nor other documents before the court provided a factual basis for those statements.

(iv) The defendant had failed to prove the truth of the factual statement A6 or to point to the source of that information.

(v) As to the photographs, the court considered that the applicant company had failed to prove that I.'s photographs had been taken either with his consent or at a public event. While it was established that the photograph with the biblical quote (see paragraph 15 above) had been taken at an official meeting on 5 May 2005, it presented only I. and not the event in general and so was unrelated to the event. The defendant had thus exercised the choice of which fragments of the photographs to publish, selecting those where only the plaintiff was shown "in a certain light". Combined with the captions added, this demonstrated that publication of the photographs was intended as an attack on the plaintiff's honour and dignity.

(vi) The totality of the circumstances showed, for the court, that the applicant company's purpose in publishing the impugned statements and photographs was deliberately to damage I.'s reputation.

25. On 23 May 2006 the Supreme Court, apparently unaware that the examination of the case at first instance had already been completed, reassigned the case to a district court in the Mykolaiv Region on the grounds that "a judge was a party to the proceedings".

26. The applicant company appealed against the first-instance court's judgment arguing in particular that the court had not been impartial because it had refused, without giving particular reasons, to suspend proceedings while the reassignment application had been pending before the Supreme Court. The applicant company also argued that the first-instance court's judgment was contrary to Article 10 of the Convention.

27. As to statement A6, the applicant company alleged that I.'s daughter-in-law (the wife of his son) was the daughter of D., who at the time was the President of the Civil Division of the Supreme Court. The plaintiff was not contesting that fact. The use of the term "perhaps" in statement A6 showed that it had been meant to communicate that the author was wondering whether a relative's presence on the Supreme Court was



protecting I. rather than being a positive affirmation that this was indeed the case. It was thus a value judgment and was true.

28. On 5 July 2006 the Supreme Court reassigned the case, at I.'s request, to the Zaporizhzhya Regional Court of Appeal.

29. On 18 August 2006 the Zaporizhzhya Regional Court of Appeal varied the judgment of the first-instance court and reaffirmed the essential part of its reasoning:

(i) The Court of Appeal reduced the amounts awarded to UAH 20,000 for non-pecuniary damage and UAH 1,000 for court fees (about EUR 2,970 and 148 respectively at the time), having regard to the applicant company's financial situation, and upheld the remainder of the first-instance court's judgment.

(ii) By way of reasoning, the Court of Appeal stated that, according to the case-law of the European Court of Human Rights, the fact that the subjects of published information had public status made such persons more open to criticism but did not deprive them of the right to sue to defend their reputation.

(iii) The Court of Appeal found unconvincing the applicant company's argument that it had pursued the legitimate aim of informing the public, as opposed to damaging I.'s reputation as President of the Regional Court. Given that the impugned statements and captions to the photographs had been presented as a narrative about certain circumstances (*розповідь про певні обставини*), the first-instance court's conclusion that they could not be seen as value judgments, but rather as insults, had been justified. An insult was a statement made not with the purpose of communicating information but with the purpose of insulting a person.

30. In its appeal on points of law, the applicant company reiterated essentially the same arguments as in its previous appeal (see paragraph 27 above). As to statement A6, the applicant company added that a letter from the chairman of the Council of Judges of Ukraine dated 8 April 2005 and quoted in the impugned article (see paragraph 12 above) was in the file. The letter was addressed to a certain Mr B. and contained a detailed response to his complaints against I. The Council stated, in particular, that the fact that D. was the father of I.'s daughter-in-law did not mean that I. had abused his position.

31. On 10 March 2008 the Odessa Regional Court of Appeal, acting as the court of cassation, amended the lower courts' decisions by rejecting I.'s claim for damages, retaining only the award of court fees (see paragraph 29 (i) above). It held that the very fact of the decisions in his favour constituted sufficient redress for I. It upheld the remainder of the lower courts' decisions. It held, in particular, that the trial judge's failure to suspend proceedings pending examination of the reassignment application by the Supreme Court did not constitute grounds for quashing its judgment. The court held that the aim of the impugned phrases had been solely to

humiliate and disparage a representative of the judiciary and the phrases had made no contribution to the resolution of the problems in the administration of justice. Criticism of a judge was possible in the context of a public debate on problems related to inefficiencies in the judicial system or to a judge's lack of independence or impartiality. However, the impugned article had not discussed those issues.

32. As concerns the matter of impartiality of the first-instance court's judge, the Court of Appel made no comment. The court of cassation stated that the fact that that judge had refused to suspend the proceedings and had rejected the challenge against himself (see paragraph 23 above) did not constitute grounds for quashing the lower courts' decisions.

### C. Article B – application no. 41214/08

#### 1. Publication

33. The article, published in the issue of the newspaper dated 11-18 May 2006, was authored by Ms K., who was at the time the director of the applicant company, and entitled “Ex-court president is ‘burying’ Lady Justice under his claims (*Экс-председатель суда «завалил» Фемиду исками*)”. Its relevant parts read:

“Claims raining down on the independent media of the Kherson Region from Mr I., who until recently used to be President of the Regional Court of Appeal, cannot be called anything other than a trend. Newspapers which take a consistent line in favour of a just and honest judicial system are being targeted.

It seems that I. ‘has had enough’ of a clear and consistent position of Mr S., the head of the Kherson City committee of the Union of Retired Officers of the Armed Forces and Law Enforcement.

Following a defamation claim against the *Grivna* newspaper, Mr I. also sued the *VIK* newspaper which had published S.’s open letter to the [regional governor]. S. had asked the governor to state his position concerning the events which became a topic for examination in the Parliament and are constantly in the newspapers. In his letter the author appealed to the government’s representative in the hope that he would not remain an impartial observer but could influence the situation as regards justice in the region. [B1] Claims of retired servicemen seeking increases in their pensions to which they are entitled by law have been pending before the courts of the region for two years. While in other regions pensioners get the money to which they are entitled by law, in our region only several dozen pensioners managed to get their money. Why do the courts work this way in our region? [B2] ...

Remarkably, this publication in the *VIK* newspaper was not the end of contacts between S. and I. Literally days after the publication of that issue, the letter writer and the judge had a conversation, at the request of the latter. S. says that a dressing-down is the only term that can describe the tone of the ‘conversation’. After this meeting the officer’s hope of establishing a dialogue with the judge and of clarifying the situation collapsed. This was the subject of a new open letter he addressed directly to Mr I. And then something totally unexpected for the retired submarine officer happened: he was attacked at night by strangers, received a serious blow to the head, obliging him to be

hospitalised. A coincidence? The relevant authorities could answer this question but they initially refused to register S.'s complaint about the attack. He has not been informed about the results of the investigation. [B3]

This is the short story of the [contacts between S. and I.] The final touch to the story will be a court judgment on the defamation claim. The claim will be examined by the same Judge St. of the Suvorovsky District Court who surprisingly gets to examine I.'s claims. In contrast to the case against our newspaper, where I. is seeking damages for himself, in the case against *VIK* his claims are entirely selfless. He is asking that damages be paid to [an orphanage]. Charity is of course a laudable enterprise, but the editorial boards of both *Grivna* and *VIK* understand that the point of the operation is not to get some money (затеяно все далеко не из-за желания получить деньги). [B4]

Most likely, court decisions... in his favour would come in handy for I. when Parliament again examines the question of his lifetime appointment. Claims granted at first instance and on appeal may serve as proof for the argument that journalists' unjustified attacks (this is how Lady Justice's servants call our critical publications) are made up and baseless. [B5] Especially because Judge St. does not take into account a seemingly logical idea... that if one of the parties is a court or a judge then the case should be examined by a higher court... [B6]"

## 2. Domestic proceedings

34. I. brought a claim against the applicant company and K., seeking retraction of statements B1-B6 and compensation for non-pecuniary damage. As regards, in particular, statement B3, the plaintiff submitted that it was based entirely on S.'s account of the events and that the author of the article had made no attempt to obtain the version of the Kherson Regional Court's staff. As far as the attack on S. was concerned, the story was presented in such a way as to generate a "cheap sensation" by creating the impression that I. was somehow implicated in the attack.

35. According to the applicant company, in the course of the trial it produced as proof of the factual grounds for the impugned statements twenty-four articles published in the local newspapers from 1997 to 2006.

36. The applicant company also produced the letter from S. to the regional governor, reference to which was made in statements B1 and B2. In the letter, dated 14 February 2006, S. stated that I. possessed property which could not be explained by his lawful income and that the Parliament had refused to appoint I. on a permanent basis. The region "was one of the last in Ukraine in terms of delivering lawful, just decisions in cases of retired military officers who sought to defend their right to a decent pension" in the courts. S. asked the governor to explain why I. was still allowed to remain in the position of the President of the Regional Court and why the governor did not intervene.

37. On 19 August 2006 the Zaporizhzhya Shevchenkivsky District Court allowed the claim in part, ordering the author of the article to apologise by retracting statements B1-B5 and the applicant company to publish the retraction in the newspaper. The court awarded UAH 50,000 (about

EUR 7,450 at the time) in compensation for non-pecuniary damage, from the defendants jointly and severally, to be paid to an orphanage. The following elements of the District Court's reasoning are worthy of note.

(i) Referring to Article 10 of the Convention the court stated that the public status of the subjects of publications did not deprive them of the right to protection of their reputation. Even though the impugned statements constituted value judgments, they were insulting.

(ii) According to the case-law of the European Court of Human Rights the fact that subjects of the published information had public status made such persons more open to criticism but did not deprive them of the right to sue to defend their reputation.

(iii) The impugned statements were insulting. The defendants had failed to provide evidence of grounds for such statements and the evidence they did provide did not contain incontrovertible facts which would allow assessment of the person of the plaintiff and the work of the court over which he presided (*не містять беззаперечних фактів, які б дозволили оцінити особу і діяльність суду*).

(iv) Referring to Article 5 of the Information Act setting out objectivity as one of the principles of information relations (see paragraph 49 below), the court said that the implementation of that principle in respect of value judgments meant that they had to have a basis. Freedom of the press and protection offered to elements of provocation in journalistic expression could not justify baseless criticism with insulting elements, as had occurred in the case.

(v) That position was in accordance with the case-law of the European Court of Human Rights. In *Lingens v. Austria* (8 July 1986, § 46, Series A no. 103) it had stressed the need to distinguish between facts and value judgments, the truth of which was not susceptible of proof. At the same time the District Court stressed the following quote from the same paragraph of *Lingens*: "The Court notes in this connection that the facts on which Mr. Lingens founded his value-judgment were undisputed, as was also his good faith."

(vi) The District Court went on to note that the defendants had failed to provide proof that the facts which the journalist evaluated in the impugned article were undisputed/incontrovertible (*доказів незаперечності оцінених журналістом фактів у даній справі відповідачі суду не надали*)<sup>2</sup> and, therefore, the court did not consider that they had acted in good faith in accordance with Article 5 of the Information Act. The court concluded that the defendants' intention was not to inform the public but rather to spread negative information about the plaintiff.

(vii) The court refused to declare statement B6 defamatory.

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2. While the English text of *Lingens* uses the term "undisputed", its Ukrainian translation cited in the District Court's judgment uses the term "незаперечний" which is more appropriately translated as "incontrovertible" or "irrefutable".

38. On 14 November 2006 the Zaporizhzhya Regional Court of Appeal upheld the judgment but modified it to the effect that damages were to be paid to I. and not the orphanage, since domestic law did not allow for the possibility of directing the funds awarded to a plaintiff to a third party charitable institution. The Court of Appeal agreed with the lower court's assessment of the amount of damages, account being taken of the plaintiff's moral suffering and disruption of his social ties, including as a public official. The first-instance court had not established that the journalist had acted in good faith and checked the information she disseminated and, accordingly, no exemption from liability under the State Support of Media Act applied (see paragraph 51 below). The Court of Appeal stated that an insult was a statement which was uttered not with the aim of disseminating information but with the aim of humiliating a person.

39. On 21 December 2007 the Odessa Regional Court of Appeal, acting as the court of cassation, upheld the lower courts' decisions. It stated that the Court of Appeal's decision was in accordance with the substantive and procedural law and there were no legal grounds to quash it.

#### **D. Subsequent events**

40. On 2 November 2006 I. was appointed to the position of judge on a permanent basis and continued to hold the position of President of the Kherson Regional Court of Appeal until 2012.

## **II. RELEVANT DOMESTIC LAW**

### **A. Code of Civil Procedure of 2004**

41. The Code was entirely restated by the Law of 3 October 2017, with effect from 15 December 2017. From that date the content and the numbering of various provisions changed. The provisions below are presented as they stood at the time when the domestic courts examined the applicant company's cases.

42. Article 108 provided that territorial jurisdiction over a case to which a judge or a court was a party would be determined by a higher court.

43. Article 201 provided that the court had to suspend (*зупиняє*) proceedings in an exhaustive list of situations, notably where it was not possible to examine the case until resolution of another case which was being examined in constitutional, administrative, civil, commercial or criminal proceedings.

44. Article 303 of the Code provided that the court of appeal was bound by the grounds of appeal unless they omitted to mention a flagrant illegality. Paragraph 2 of the article allowed the court of appeal to examine the

evidence if the first-instance court had unjustifiably refused to examine it or had examined it in breach of established procedure, the court of appeal could also examine new evidence if a good reason was shown for failure to produce it before the first-instance court. Article 309 provided that the court of appeal could quash the first-instance court's judgment and deliver its own judgment or could amend the lower court's judgment where the first-instance court had committed an error of fact or law.

45. Article 311 of the Code provided that a court of appeal had to quash a first-instance judgment and remit the case for re-examination if the judgment had been delivered by a court without jurisdiction or where the composition of the court was unlawful.

46. Articles 338 and 341 of the Code defined the powers of courts of cassation. They provided that a court of cassation could modify a lower court's decision or deliver its own decision on the merits of the case where it established that the lower court had committed an error of substantive law. The court of cassation could quash a lower court's decision and remit the case for re-examination in case of a number of serious procedural breaches, the list of which was exhaustive and related mainly to the composition and jurisdiction of the lower court.

### **B. Civil Code of 2003**

47. Article 277 provides that an individual whose non-pecuniary rights have been infringed as a result of the dissemination of untrue information has the right to reply and obtain a retraction. Article 297 provides that an individual has the right to sue to defend his or her dignity and honour. Article 280 provides that an individual whose non-pecuniary rights have been infringed is entitled to damages.

48. Article 307 § 1 provides that an individual can be photographed only with his or her consent. Consent is presumed if the photograph is taken openly in the street or at a public event.

### **C. Information Act of 1992**

49. Article 5 of the Act, as worded at the relevant time, declared that objectivity and credibility of information constituted one of the principles of legal relations in the field of information.

50. Article 47-1 of the Act provides that no one may be held liable for making value judgments. It defines value judgments as follows:

“Value judgments, excluding insults and libel, are statements which do not contain factual data, in particular, criticism, evaluation of actions, and also statements which cannot be said to contain factual data because of the way they are worded, in particular, [by means of] hyperbole, allegory, or satire. Value judgments are not subject to retraction and their truthfulness need not be proven ...”

#### **D. State Support of Mass Media Act of 1997**

51. Article 17 provides that journalists and mass media professionals are exempted from liability for the dissemination of untrue information if the court establishes that the journalist has acted in good faith and has checked the information.

#### **E. Rules Concerning the Status of Judges**

52. At the relevant time Article 128 of the Constitution of Ukraine provided that following initial appointment by the President for a five-year term, judges could then be re-appointed by Parliament until they reached sixty-five years of age (“permanent appointment”). The Constitution came into force in 1996. Prior to that, under the 1992 Status of Judges Act (Section 9 §§ 2 and 3), regional court judges were appointed by Parliament for ten-year terms.

53. Section 28 § 1 of the 2002 Judicial Organisation Act provided that presidents of courts of appeal had a number of representative functions and functions in the organisation of the court’s work. As far as lower courts were concerned, the president of the court of appeal had to collect and analyse courts’ statistics and practice and, for this purpose, had the power to request files from the lower courts. The presidents also recommended candidates for the positions of president and vice-president of district courts.

### **THE LAW**

#### **I. JOINDER OF THE APPLICATIONS**

54. The Court considers that, pursuant to Rule 42 § 1 of the Rules of Court, the applications should be joined, given their common factual and legal background.

#### **II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION**

55. The applicant company complained that the trial judge of the Kherson Suvorovsky District Court, who had examined the case concerning Article A at first instance, was not impartial and that that court had not been a “tribunal established by law” within the meaning of Article 6 § 1 of the Convention, of which the relevant part reads:

“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

### 1. “Tribunal established by law”

56. The applicant company submitted that the reassignment of its case by the Supreme Court had automatically and retrospectively removed jurisdiction from the court which had in fact examined the case prior to the reassignment, with the result that the appeal court had been required to quash the judgment and remit the case.

57. The Government submitted that the higher domestic courts had rejected the applicant company’s arguments in that respect and it was primarily for them to interpret and apply domestic law.

58. The Court notes that the applicant company’s reading is not evident from the domestic legal provision invoked by it (see paragraph 45 above) and it was implicitly rejected by the higher domestic courts. Moreover, the applicant company has failed to present any examples from domestic case-law which would support its interpretation (see, *mutatis mutandis*, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 71, 27 June 2017). Therefore, nothing indicates that the domestic courts’ interpretation of the domestic law was arbitrary or manifestly unreasonable. Accordingly, this complaint should be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

### 2. Impartiality

59. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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 parties’ submissions

60. In its initial submissions to the Court, the applicant company submitted that it had challenged the trial judge, in particular on the grounds that he had refused its request to suspend proceedings while the Supreme Court was examining the reassignment application (see paragraph 23 above) but that same judge had rejected the challenge. No reason had been given for the decision to reject the challenge beyond the conclusion that it had been unfounded.

61. The Government stressed that, at the time the first-instance court examined the case, the Supreme Court had not yet reassigned the case to another court. In any case, it was primarily for the domestic courts to interpret and apply domestic law. Domestic law did not require that, where



reassignment of jurisdiction was requested, examination of the case be suspended (see paragraph 43 above). There were no grounds to doubt the impartiality of the trial judge. Moreover, the judgment delivered by that judge at first instance had then been upheld, other than in respect of the amount of damages, on appeal at two levels.

62. The applicant company did not submit observations in reply to the Government's observations on the admissibility and merits.

## 2. *The Court's assessment*

### (a) **Relevant principles**

63. The relevant principles of the Court's case-law concerning the requirement of impartiality were restated in *Morice v. France* ([GC], no. 29369/10, §§ 73-78, ECHR 2015, with further references) and summarised in *Mikhaylova v. Ukraine* (no. 10644/08, § 56, 6 March 2018).

### (b) **Application of the above principles to the present case**

64. The Court notes at the outset that Judge S.'s impartiality cannot be called into question under the subjective test.

65. The Court has already examined a situation similar to that which occurred in the present case in *Gazeta Ukraina-Tsentr v. Ukraine* (no. 16695/04, §§ 10 and 34, 15 July 2010). In that case the applicant company had been sued by a judge who held the post of president of another court in the same region and chaired the regional council of judges. The defendants had asked the Supreme Court to reassign the case to a court in a different region. Nevertheless, the first-instance court had continued to examine the case while the Supreme Court was considering the reassignment application, which it eventually granted after the first-instance court had already delivered its judgment. In that case the Court observed that the Supreme Court's reassignment decision suggested that the applicant company's fear about a risk of bias of the courts in the region, on account of an important position occupied by the plaintiff in the region's courts, was not without substance.

66. There is no reason to reach a different conclusion in the present case. The plaintiff occupied a position of importance in the region's judicial system (see, *mutatis mutandis*, *Salov v. Ukraine*, no. 65518/01, § 83, ECHR 2005-VIII (extracts)). The procedure for reassignment of cases invoked by the applicant company was intended to ensure the necessary safeguards in cases where parties could have doubts as to the impartiality of a region's courts in such situations. The Court, in its case-law, has often stressed the importance of such safeguards (see, for example, *Remli v. France*, 23 April 1996, § 48, *Reports of Judgments and Decisions* 1996-II).

67. The fact that the reassignment application was eventually granted suggests that the applicant company's fears were not seen by the Supreme Court as baseless. Because the trial judge failed to allow sufficient time for that procedure to be completed, thus depriving it of practical effect, the applicant company's fears that that judge lacked impartiality can be held to be objectively justified.

68. It is true that the applicant had access to the Court of Appeal which had full jurisdiction to assess matters of fact and law. The impartiality of that court is not open to doubt. This may have been sufficient to redress the breach of the impartiality requirement at the first-instance level (see, for example *Helle v. Finland*, 19 December 1997, § 46, *Reports of Judgments and Decisions* 1997-VIII). However, in dealing with the applicant company's appeals, the Court of Appeal, and subsequently the court of cassation, disregarded its complaints in respect of alleged lack of impartiality (see paragraph 32 above). Therefore, they did not remedy the defect in question (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 134, ECHR 2005-XIII, and *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, § 54, 30 November 2010).

69. There has, accordingly, been a violation of Article 6 § 1 of the Convention on account of the lack of objective impartiality on the part of the trial judge in the proceedings concerning Article A.

### III. ALLEGED VIOLATIONS OF ARTICLE 10 OF THE CONVENTION

70. The applicant company complained that the domestic courts' decisions holding it liable for the publication of the two impugned articles were in breach of Article 10 of the Convention, which reads:

“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

71. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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 parties' submissions*

#### **(a) The applicant company**

72. In its initial submissions to the Court, the applicant company argued that the interference with its freedom of expression had not been “prescribed by law” since the exclusion of insults and libel from the protection afforded by Article 47-1 of the Information Act (see paragraph 50 above) lacked foreseeability, as those notions were not defined, thus resulting in sanctions for value judgments, such as the remark that I. was “a hard nut to crack” (A8), even though there was nothing explicitly insulting, no profanities or even anything sharply negative in the impugned remarks. The aim of the domestic courts’ decisions had not been legitimate, as their real goal had been to punish the applicant company for the publication of information and value judgments on matters of public interest. While I. had been a judge, the domestic courts had not invoked the aim of maintaining the authority and impartiality of the judiciary as their aim.

73. As to necessity in a democratic society, the applicant company submitted that the press in Kherson had been criticising I. for corrupt practices since 1998. He was in that sense a public figure. In January 2006 a number of regional publications had alerted the public that I. was to be considered by Parliament for lifetime appointment (see paragraph 9 above). I. started suing the publications after his appointment had been delayed in Parliament.

74. Article A had been dedicated to the coverage of that parliamentary debate, which was clearly of public interest. The domestic courts’ decisions, if upheld, would mean that the press could only write about positive or neutral events and any dissemination of negative information would be subject to sanctions, thus entailing self-censorship. As far as the publication of I.’s photograph was concerned, the domestic courts had failed to take into account that he had been photographed at a public event, where he had sat on a panel and had thus knowingly exposed himself to the cameras.

75. Article B had constituted a continuation of the same discussion, in the context of the claims brought by I. against the publications which covered the scandal involving his stalled permanent appointment. That discussion had been of particular public interest as it had concerned the difficulties the top judge of the region had encountered in securing his reappointment. A serious sanction had been imposed on the applicant company and there had been little reasoning in that decision. In particular, the domestic courts had failed to point to any specific circumstances

showing that I.'s reputation had been damaged. Notably, after the publications he had continued to hold the post of President of the Kherson Regional Court of Appeal. The amount awarded was particularly high considering the average level of income in Ukraine and higher than what was usually awarded in defamation cases by the Ukrainian courts. According to the applicant company, the awards usually did not exceed UAH 10,000 (about EUR 1,346 at the time). The fact that I. was at the centre of a "corruption scandal" should rather have militated in favour of lowering the damages, if any were to be awarded at all.

76. The applicant company did not submit observations in reply to the Government's observations on the admissibility and merits.

**(b) The Government**

77. The Government did not contest that there had been an interference with the applicant company's freedom of expression. They submitted, however, that it was prescribed by law, namely under the provisions of the Civil Code (see paragraph 47 above). It pursued the legitimate aim of protecting I.'s reputation. Protection of the rights guaranteed by Article 8 as well as protection of public servants from offensive attacks which were calculated to affect them in the performance of their duties were legitimate interests recognised in the Court's case-law (citing *Radio France and Others v. France*, no. 53984/00, § 31, ECHR 2004-II, and *Janowski v. Poland* [GC], no. 25716/94, § 33, ECHR 1999-I, respectively).

78. As to the "necessity in a democratic society", the Government referred to the Court's statement in *Perna v. Italy* (no. 48898/99, § 47, ECHR 2003-V) that "merely to scrutinise each of the statements taken into consideration by the national authorities in reaching their decision that the offence of defamation had been committed would be to lose sight of the article's overall content and its very essence".

79. It was significant that I. had been a civil servant and therefore the limits of acceptable criticism had been wider than for a private individual. The allegations of illegal conduct on the part of a judge had been a matter of public concern and came within the scope of a public debate on a matter of general importance. However, the principle that freedom of expression carried with it "duties and responsibilities" applied to the media even with respect to such matters of serious public concern.

80. Two different courts of first instance in different regions, having carefully examined the case-file material, the parties' statements and the Court's case-law, had concluded that the impugned statements could not be protected as value judgments as they had been published with the intention of spreading negative information about I. The Government stressed that the applicant company had not been ordered to pay any damages in respect of Article A.

81. As far as Article B was concerned, the sanction imposed on the applicant company – publication of a retraction and payment of damages – had been moderate. The amount of damages awarded was modest and, in addition, the applicant company’s burden was shared with the co-defendant.

## 2. *The Court’s assessment*

### (a) **Existence of an interference, “prescribed by law”, legitimate aim**

82. The Court finds that the decisions of the domestic courts in respect of both newspaper articles constituted an interference with the applicant company’s freedom of expression. Indeed, the Government did not contest that point. The interference was prescribed by law, namely the relevant provisions of the Civil Code (see paragraph 47 above), and pursued the legitimate aim of the protection of the reputation or rights of others (see *Gazeta Ukraina-Tsentr*, cited above, § 49).

### (b) **“Necessary in a democratic society”**

83. It remains to be determined whether that interference was necessary in a democratic society.

#### (i) *Relevant general principles*

(α) General principles concerning the Court’s approach to the question of necessity of interferences with freedom of expression

84. The general principles were restated in *Bédat v. Switzerland* ([GC], no. 56925/08, § 48, 29 March 2016):

“(i) Freedom of expression 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. Subject to paragraph 2 of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

(ii) 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 European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court...

(iii) The Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at 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, moreover, that they relied on an acceptable assessment of the relevant facts ...”

(β) The role of the press and responsible journalism

85. The Court has emphasised the essential function that the press fulfils in a democratic society. Although the press must not overstep certain bounds, particularly as regards 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. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 132, ECHR 2015, with further references).

86. The protection afforded by Article 10 of the Convention to journalists 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. The concept of responsible journalism, as a professional activity which enjoys the protection of Article 10 of the Convention, is not confined to the content of information which is collected and/or disseminated by journalistic means. That concept also embraces, *inter alia*, the lawfulness of the conduct of a journalist, including his or her public interaction with the authorities when exercising journalistic functions. The fact that a journalist has breached the law in that connection is a most relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly (see *Pentikäinen v. Finland* [GC], no. 11882/10, § 90, ECHR 2015).

87. Furthermore, Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of this provision, freedom of expression carries with it “duties and responsibilities”, which also apply to the media even with respect to matters of serious public concern (see, for example, *Dorota Kania v. Poland* (no. 2), no. 44436/13, § 64, 4 October 2016, with further references).

88. Moreover, these “duties and responsibilities” are liable to assume significance when there is a question of an attack on the reputation of a named individual or an infringement of the “rights of others”. Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the

allegations. These factors, in turn, require consideration of other elements such as the authority of the source, whether the newspaper had conducted a reasonable amount of research before publication, whether the newspaper presented the story in a reasonably balanced manner and whether the newspaper gave the defamed persons the opportunity to defend themselves (*ibid.*, § 65).

(γ) Civil servants and judges as subjects of publication and the limits of acceptable criticism

89. Civil servants acting in an official capacity are subject to wider limits of acceptable criticism than ordinary individuals (see *Medžlis Islamske Zajednice Brčko and Others*, cited above, § 98).

90. Questions concerning the functioning of the justice system, an institution that is essential for any democratic society, fall within the public interest. In this connection, regard must be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against gravely damaging attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying (see *Morice*, cited above, § 128).

91. Nevertheless – save in the case of gravely damaging attacks that are essentially unfounded – bearing in mind that judges form part of a fundamental institution of the State, they may as such be subject to personal criticism within the permissible limits, and not only in a theoretical and general manner (*ibid.*, § 131).

(δ) The distinction between statements of fact, value judgments and insults

92. In its judgments in *Lingens v. Austria* (8 July 1986, § 46, Series A no. 10) and *Oberschlick v. Austria (no. 1)* (23 May 1991, § 63, Series A no. 204), the Court drew a distinction between statements of fact and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself. However, where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient “factual basis” for the impugned statement (see *Morice*, cited above, § 126).

93. As regards value judgments which have been found by the national courts to be of a defamatory character, the Court assesses the national court’s findings on the question whether the language used in the statement was of an excessive or dispassionate nature, whether any intention of defaming or stigmatising the opponent was disclosed, and whether the

statement had a sufficient factual basis (see *Do Carmo de Portugal e Castro Câmara v. Portugal*, no. 53139/11, § 31, 4 October 2016, with further references).

94. Moreover, a clear distinction must be made between criticism and insult and the latter may, in principle, justify sanctions (see *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and 3 others, § 67, ECHR 2011). The causing of offence may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult a person. However, the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well merely serve stylistic purposes. For the Court, style constitutes part of the communication as the form of expression and is as such protected together with the content of the expression (see *Uj v. Hungary*, no. 23954/10, § 20, 19 July 2011).

(e) Balancing of rights under Articles 8 and 10 of the Convention

95. In order to fulfil its positive obligation to safeguard one person's rights under Article 8, the State may have to restrict to some extent the rights secured under Article 10 for another person. When examining the necessity of that restriction in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression as protected by Article 10 and, on the other, the right to respect for private life as enshrined in Article 8 (see *Bédat*, cited above, § 74).

96. 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 in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012).

97. In its case-law, the Court has identified a number of relevant criteria whereby the right to freedom of expression is balanced against the right to respect for private life (*ibid.*, §§ 89-95), including:

(a) whether the impugned publication contributed to a debate of general interest;

(b) how well known is the person concerned and what is the subject of the report?;

(c) the prior conduct of the person concerned;

(d) the method of obtaining the information and its veracity;

(e) the content, form and consequences of the publication;

(f) the severity of the sanction imposed.



98. Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 92, ECHR 2015 (extracts)).

(ii) *Application of the above principles to the present case*

(α) Whether Article 8 interests are in play

99. The Court notes at the outset that the applicant company did not contest the Government's submissions that the domestic courts' decisions pursued the legitimate aim of protecting I.'s rights, as guaranteed by Article 8. It did not argue that the publications had not reached the requisite threshold of seriousness capable of causing prejudice to I.'s enjoyment of those rights. The Court sees no reason to find otherwise.

(β) The Court's approach

100. The domestic courts examined the impugned statements and photographs in their combination rather than separately. Such an approach is, as such, in line with the Court's case-law. Indeed, the Court has held that merely to scrutinise each of the statements taken into consideration by the national authorities in reaching their decisions concerning alleged defamation may lead one to lose sight of the article's overall content and its very essence (see, for example, *Perna*, cited above, § 47).

101. Still, as in all cases of this type, the Court needs to ascertain whether the domestic courts gave relevant and sufficient reasons for their decisions and reached conclusions consistent with the Convention. In that respect the Court notes that the two impugned articles contained many distinct elements of different nature and gravity. Thus, in the particular circumstances of the present case, an adequate analysis of the reasons given by the domestic courts can only be conducted by drawing a distinction between different elements of the articles (see, for a similar approach, *Tara and Poiata v. Moldova*, no. 36305/03, §§ 27-33, 16 October 2007, and *Stomakhin v. Russia*, no. 52273/07, § 97, 9 May 2018).

102. The Court will therefore proceed to examine the two impugned articles and the domestic courts' decisions concerning them in the light of the criteria established in its case-law and set out in paragraph 97 above.

The Court will first focus on the general criteria, such as the subject of the publication, which are common for the two articles.

Then it will proceed to examine the content and form of the articles, and the domestic courts' assessment, separately in respect of each of them. While considering the articles as a whole, the Court will have particular regard to their disputed parts (see, for example, *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04, § 90, 1 March 2007).

The Court will conclude by an overall assessment, taking into account in particular the severity of the sanctions imposed on the applicant company.

(γ) Both articles: contribution to a debate of general interest, how well-known was I., his prior conduct and the consequences of the publications

103. The domestic courts found that the impugned articles made no contribution to a debate of general interest, in that they pursued the aim of insulting I. rather than informing the public (see, in particular, paragraphs 29 (iii) and 38 above). The Court observes that both of the impugned articles were published in the context of the parliamentary procedure concerning I.'s permanent appointment to the post of judge. This procedure had already been the subject of press comment prior to the publication of the first of the impugned articles (see paragraph 9 above). In the course of the debate concerning I.'s appointment MPs discussed allegations of misconduct against him. This procedure was public and had incidence on I.'s role as President of the Regional Court of Appeal. For the Court, these factors argue in favour of the conclusion that the impugned articles made a certain contribution to a debate of general interest.

104. It is a different matter, however, whether all the impugned elements of the articles made a contribution to that debate in accordance with the tenets of responsible journalism. This is a matter which the Court considers it appropriate to examine below, separately in respect of each article.

105. The domestic courts implicitly acknowledged that I. was a public figure (see paragraphs 29 (ii) and 37 (ii) above) but did not refer to the fact that he was a judge and was thus subject to a duty of discretion that precluded him from replying through the media (see *Morice*, cited above, § 128). Moreover, neither the domestic courts nor the parties before the Court provided any specific information on I.'s prior conduct.

106. As to the consequences of the published articles, the Court does not see any reason to disagree with the domestic courts' assessment that I.'s reputation was harmed by them. However, it also observes that they did not have any dramatic impact on I.'s career, since shortly after the publications he was reappointed to his judicial post on a permanent basis and continued to hold the position of President of the Regional Court of Appeal for years afterwards (see paragraph **Error! Reference source not found.** above).

(δ) Article A: the content and form of the impugned statements and the photographs

107. The Court considers that in terms of content and form Article A contained five distinct elements:

- (i) comments on the failure of I.'s candidature before Parliament (statements A1, A2, A7 and A8), and statement A5 to the effect that I.'s misdeeds were reported as far back as 1998;
- (ii) statement A6 concerning I.'s relative on the Supreme Court;

- (iii) I.'s photograph with the biblical quotation;
- (iv) I.'s other photograph, which has not been submitted to the Court;
- (v) supposed quotes from a report to "a high-ranking official" about I.'s alleged misconduct: statements A3 and A4.

108. The Court will examine each of those elements and the domestic courts' reasoning in their respect in turn.

*Comments on the failure of I.'s candidature before Parliament (A1, A2, A7 and A8), and statement to the effect that I.'s misdeeds were reported as far back as 1998 (A5)*

109. The Court considers that statements A1, A2, A7 and A8 constituted mere comments on the failure of I.'s candidature before Parliament in its plenary sitting and clearly had a sufficient factual basis, namely the debate at that public meeting. The impugned expressions, though sarcastic, remained within an acceptable degree of stylistic exaggeration employed to express the author's value judgment. No profane, vulgar or patently offensive language or imagery was used. They were thus value judgments and had a sufficient factual basis. The mere fact that they were expressed in a sarcastic form is not sufficient to classify them as insults.

110. Essentially the same considerations apply to statement A5, which was a merely sarcastic description of the content of the 1998 document which had contained complaints about I.'s supposed misdeeds. There is no indication that the veracity of the document was ever in doubt and the fact that I. had indeed been disciplined on that occasion was not questioned.

111. In summary, the Court considers that, for an objective reader, the above statements could not be read as insults.

*Statement concerning I.'s relative on the Supreme Court (A6)*

112. The domestic courts did not specifically comment on the applicant company's argument that the father of I.'s daughter-in-law was indeed a Supreme Court judge (see paragraphs 12, 27 and 30 above). This fact was never seriously in dispute.

113. Accordingly, the Court also has difficulty understanding the reasons for the domestic courts' finding that statement A6 was untrue. It appears, although this is not stated in the decisions, that the courts took issue not with the existence or not of family relations between I. and a Supreme Court judge but rather the part of the statement which suggested that that Supreme Court judge had helped I. feel confident in his position.

114. However, that part of the statement was quite vague and was qualified by the word "perhaps". Whether it is seen as a statement of fact or a value judgment, it had a sufficient basis in the fact that the plaintiff's relative did indeed sit on the Supreme Court and that that situation was at least not unfavourable to the applicant as he himself, for a long time, occupied a high-ranking position in the judiciary. The impugned article

merely stated that there was a possibility of a causal connection between those two facts and did not assert that there was in fact such a connection. The domestic courts failed to give any reasons for their finding that the factual basis for that statement was insufficient.

*I.'s photograph with the biblical quotation*

115. The domestic courts limited their examination of that photograph to observing that the applicant company had failed to prove that it had been taken with I.'s consent or was published as part of covering a public event and that the choice of the published fragment of the photograph and its combination with the caption had been intended to present I. in a "certain light" (see paragraph 24 (v) above).

116. That was the extent of the courts' reasoning on this issue. The courts implicitly acknowledged that the photograph was taken at a public event. They discarded this circumstance, however, considering that the publication of the photograph was unrelated to covering of the public event in question. While this is a relevant consideration, the analysis could not stop there and other criteria set out in paragraph 97 above are relevant.

117. Of those other criteria, the domestic courts commented only on I. being a public figure (see paragraph 105 above). Their comment on the content and form of the photograph is so succinct that it is difficult to understand: they failed to explain what was precisely the "certain light" in which the photograph presented I. Thus, the Court finds that the domestic courts failed to give sufficient reasons for their ruling in respect of the photograph and its accompanying caption.

*I.'s other photograph which has not been submitted to the Court*

118. Since the applicant company has not submitted the other impugned photograph (see paragraph 16 above), the Court has no basis on which to question its assessment made by the domestic courts.

*Supposed quotes about I.'s misconduct from a report to "a high-ranking official" (statements A3 and A4)*

119. Those statements pointed to misconduct on the part of the plaintiff, presenting him as a person who had developed a network of connections with persons of influence. They were presented as quotes from a document supposedly available to the applicant company. That document was provided neither to the Court nor to the domestic courts, and the applicant company failed to explain this in any way, for example by the need to protect its sources. In fact the applicant company did not even assert before the courts that the document really existed.

120. The Court, therefore, considers that it has not been shown that in making these statements the applicant company acted in good faith.

(ε) Article B: the content and form of the impugned statements

121. The Court considers that, in terms of content and form, Article B contained two distinct elements:

- (i) statements B1-B3 describing interactions between S., an aggrieved litigant, and I. as the court president;
- (ii) statements B4 and B5 to the effect that I.'s lawsuits against the applicant company and another newspaper were meant to improve I.'s reputation before re-examination of his candidacy for permanent appointment by the Parliament.

122. The domestic courts categorised those statements as value judgments (see paragraph 37 (iii) above). The Court does not need to take a definitive position on this point since, even in case of value judgments, proportionality of an interference depends on whether there exists a sufficient “factual basis” for such a judgment. The domestic courts concluded that there was no such basis.

123. The Court will first examine the overall standards used by the domestic courts in reaching that conclusion and will then examine each of those two groups of statements in turn to see if the domestic courts' conclusions in their respect were based on relevant and sufficient reasons and consistent with the Convention requirements.

*The standard employed by the domestic courts*

124. The Court must stress the well-established principle of its case-law that the requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself (see *Lingens*, cited above, § 46). There is a fundamental difference between the legitimate requirement that journalists act in accordance with the precepts of responsible journalism, notably by conducting a reasonable amount of research before publication and presenting the story in a reasonably balanced manner (see *Dorota Kania*, cited above, § 65); and, on the other hand, a requirement, antithetical to freedom of expression, for the author of a value judgment to show that the factual basis for the statement is either “uncontested” or “incontrovertible”.

125. It was the latter impossible-to-fulfil standard that the first-instance court used (see paragraph 37 (iii) above). By contrast, the domestic court of appeal did refer to the provision of the domestic law which exempted journalists from liability if they acted in good faith and checked the information they disseminated and concluded that the applicant company had failed to comply with that, lower, standard (see paragraphs 38 and 51 above). Therefore, the flaw in the first-instance court's standard is not, in itself, decisive. The Court still needs to ascertain whether the domestic courts gave reasons and reached conclusions consistent with the Convention in respect of each of the relevant groups of statements.

*Statements B1-B3 describing interactions between I. and S., an aggrieved litigant*

126. The applicant company has not shown, either before the domestic courts or before this Court, that it conducted any good faith research to verify the veracity of the factual elements of statement B3, notably the innuendo that I. had somehow been involved in the attack on S., an aggrieved litigant who had criticised him. The applicant company has not pointed to any evidence to support that innuendo or its efforts to obtain it. It thus failed to comply with the tenets of responsible journalism. Therefore, the Court has no basis on which to question the assessment made by the domestic courts in respect of statement B3. Statements B1 and B2 were closely linked to B3, as they all described the interactions between I. as the court president and S. Therefore, the Court sees no reason to disagree with the domestic courts' assessment in their respect either.

*Statements B4 and B5 to the effect that I.'s court claims against the applicant company and another newspaper were meant to improve I.'s reputation before re-examination of his candidacy for permanent appointment by the Parliament*

127. These statements constituted comments on I.'s motivation in bringing his claims. Little, if any, concrete proof could conceivably be cited for them. The Court considers that the fact that the claim was brought after the initial failure of the plaintiff's candidacy for permanent appointment in the Parliament constituted sufficient factual basis for those statements. The domestic courts failed to explain their reasons for finding otherwise.

(ζ) Overall assessment of the necessity for the interference

128. In view of the above the Court finds that the interference was not based on "sufficient" reasons in respect of:

- (i) statements A1, A2 and A5 to A8 and I.'s photograph with the biblical quotation;
- (ii) statements B4 and B5.

129. As far as those elements of the impugned articles were concerned, the domestic courts have failed to conduct the balancing exercise in conformity with the criteria laid down in the Court's case-law.

130. In addition, the Court notes that the damages the domestic courts awarded to the plaintiff in the proceedings concerning Article B cannot be considered negligible taking into account the nature of the impugned statements and other circumstances analysed above.

131. As far as the remaining elements of the impugned articles are concerned, the interference was based on sufficient reasons (see paragraphs 118 to 120 and 126 above). Even considering the damages awarded in respect of Article B, the applicant company has failed to show that the

authorities overstepped their margin of appreciation and that the interference was not necessary in a democratic society.

132. There has, accordingly, been:

(i) a violation of Article 10 of the Convention on account of the domestic courts' decisions in respect of statements A1, A2, A5 to A8, I.'s photograph with the biblical quotation and in respect of statements B4 and B5;

(ii) no violation of Article 10 of the Convention on account of the domestic courts' decisions in respect of the remaining impugned elements of Articles A and B.

#### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

133. 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**

134. The applicant company claimed EUR 1,516.70, corresponding to the amount which was allegedly levied from its bank account in execution of the domestic courts' decisions, in respect of pecuniary damage, and EUR 25,000 in respect of non-pecuniary damage. In support of the latter claim, it alleged that owing to the impugned decisions of the domestic courts it had been “in a state of stress” from 2006 to 2009.

135. The Government contested those claims, considering them unsubstantiated. In respect of the pecuniary damage claimed, they submitted that in the event of a finding of a violation the applicant company would be entitled to request review of the decision of the Court of Appeal concerning Article B under which that amount had been levied on its account. In respect of the non-pecuniary damage claim the Government voiced their doubts as to whether the applicant company, as a commercial entity, could suffer stress and claim compensation for such damage.

136. The Court notes that the Government did not contest that the amount claimed in respect of pecuniary damage had been levied in execution of the domestic courts' decisions concerning Article B. The Court has found a violation of Article 10 on account of those decisions in respect of two statements in Article B and no violation of that provision in respect of the majority of the statements in that article. It is unclear from the domestic courts' decisions which part of the award was to be attributed to each of the statements (compare *Krone Verlag GmbH & Co. KG v. Austria* (no. 3), no. 39069/97, § 40, 11 December 2003). It appears that the statements in respect of which the Court found no violation of Article 10

were actually the most damaging. Finally, only a small part of the total amount awarded, EUR 7,450, was actually collected.

137. Therefore, the Court is unable to conclude that there is a causal link between the cost borne by the applicant company and the violation it has found. The Court accordingly dismisses its claim for pecuniary damage.

138. At the same time, the Court, in view of the violations found, considers that an award of compensation for non-pecuniary damage is justified in this case. Ruling on an equitable basis, it awards the applicant company EUR 4,000 in respect of non-pecuniary damage.

### **B. Costs and expenses**

139. The applicant company made no claim for costs and expenses. Accordingly, the Court makes no award under this head.

### **C. Default interest**

140. 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. *Decides* to join the applications;
2. *Declares* the complaint, under Article 6 § 1 of the Convention, that the first-instance court in the proceedings concerning Article A was not a “tribunal established by law”, inadmissible and the remainder of the application admissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of a lack of objective impartiality on the part of the trial judge in the proceedings concerning Article A;
4. *Holds* that there has been a violation of Article 10 of the Convention on account of the domestic courts’ decisions in respect of statements A1, A2, A5 to A8, I.’s photograph with the biblical quotation and in respect of statements B4 and B5;
5. *Holds* that there has been no violation of Article 10 of the Convention on account of the domestic courts’ decisions in respect of the remaining impugned elements of Articles A and B;



6. *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, EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 16 April 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli  
Registrar

Jon Fridrik Kjølbro  
President