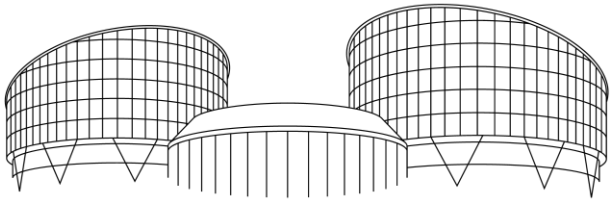

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF EDITORIAL BOARD OF PRAVOYE DELO AND SHTEKEL v. UKRAINE

(Application no. 33014/05)

JUDGMENT

STRASBOURG

5 May 2011

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

In the case of Editorial Board of Pravoye Delo and Shtekel v. Ukraine,

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

Dean Spielmann, *President,*
Elisabet Fura,
Karel Jungwiert,
Mark Villiger,
Isabelle Berro-Lefèvre,
Ann Power,
Ganna Yudkivska, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 5 April 2011,

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

PROCEDURE

1. The case originated in an application (no. 33014/05) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the editorial board of the newspaper *Pravoe Delo* ("the first applicant") and a Ukrainian national Mr Leonid Isaakovich Shtekel ("the second applicant") on 22 August 2005.

2. The applicants were represented before the Court by Ms L. V. Opryshko, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev, of the Ministry of Justice.

3. On 13 October 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 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The first applicant is the editorial board of *Pravoe Delo*, a newspaper officially registered in Odessa in May 2000. The second applicant is the editor-in-chief of *Pravoe Delo*. He lives in Odessa.

5. At the material time *Pravoe Delo* was a local newspaper published three times a week with a circulation of 3,000 copies. It published reports and material on political and social matters in Ukraine and, in particular, the Odessa Region. Due to lack of funds, the newspaper often reprinted articles and other material obtained from various public sources, including the Internet.

6. On 19 September 2003 *Pravoe Delo* published an anonymous letter allegedly written by an employee of the Security Service of Ukraine, which the second applicant's colleague, Ms I., had downloaded from a news website. The letter contained allegations that senior officials of the Odessa Regional Department of the Security Service had been engaging in unlawful and corrupt activities, and in particular that they had connections with members of organised criminal groups. One of the paragraphs of the letter read as follows:

> "... The Deputy Head of [the Odessa Regional Department of the Security Service] [I. T.], a close friend and assistant of the Head of the Department P., established 'business' contacts with [the organised criminal group] of [A. A.] ... A member of [the organised criminal group G. T.], an agent of [A. A.], who is in charge of the main areas of activities of the gang: [he is] a coordinator and sponsor of murders, [he] meets with [I. T.] and resolves financial issues for the top officials of the Department of [the Security Service] in the Odessa Region ..."

7. The letter was followed by these comments, prepared by Ms I. on behalf of the editorial board:

> "When publishing this letter without the knowledge and consent of the editor-in-chief, I understand that I may not only face trouble ... but I may also create problems for the newspaper. Because, if this letter is [misinformation], then [the media], in which it appears may be endangered. On the other hand, if this letter is genuine, then its author faces a higher risk. Besides, given that this *anonimka* [anonymous letter] has already been published on the Odessa website Vlasti.net (to which we refer, in accordance with their requirement), we have the blessing of God [to publish it]. We are proceeding on the understanding that, in accordance with the Act on democratic civil control over the military organisation and law-enforcement organs of the State, we are carrying out civil control and, pursuant to section 29 of the Act, we would like to receive open information concerning the facts described in this letter from the relevant authorities. Moreover, [it is to be noted] that the Department of [the Security Service] in the Odessa Region did not react to an analogous publication in the *Top Secret* [newspaper] ... I remind [you] that the [*Pravoe Delo*] newspaper ... is widely open for letters in reply and comments from all interested agencies."

8. In October 2003 G. T., who at the time lived in Odessa and was the President of the Ukraine National Thai Boxing Federation, lodged a defamation claim with the Prymorskyy District Court of Odessa against the applicants. G. T. alleged that the information in the *Pravoe Delo* issue of 19 September 2003 concerned him, that it was untrue and had damaged his dignity and reputation. He asked the court to order the applicants to publish

a retraction and an apology and to pay him compensation for non-pecuniary damage in the amount of 200,000 Ukrainian hryvnias (UAH)[1].

9. The applicants first argued before the court that they were not responsible for the accuracy of the information contained in the material that they had published, as they had reproduced material published elsewhere without any modifications. The publication contained a reference to the source of the material and was followed by comments explaining the editors' position regarding the material and inviting comments from the persons and bodies concerned. The applicants also submitted that, if the court were to award G. T. the amount of compensation he had claimed, the newspaper would become insolvent and would have to close.

10. Subsequently, at a hearing on 24 April 2004, the second applicant stated that the article was not about the claimant and that its wording did not necessarily establish that it was a particular "G. T." who was being referred to.

11. On 7 May 2004 the court ruled against the applicants. It found that the information at issue did concern the claimant, who was a public figure involved in public activities in the Odessa Region and had represented Ukraine at sports events abroad in his capacity as the President of the Ukraine National Thai Boxing Federation. In that context, the court noted that this had not been contested by the applicants in their initial submissions and that the publication was about the activities of the Security Service in the Odessa Region. The court further held that the content was defamatory and that the applicants had failed to prove that it was truthful. It found no grounds to release the applicants from civil liability under section 42 of the Press Act, as the internet site to which the applicants referred was not printed media registered pursuant to section 32 of the Press Act.

12. The court ordered the first applicant to publish a retraction of the following content of the publication:

> "... A member of [the organised criminal group G. T.], an agent of [A. A.], who is in charge of the main areas of activities of the gang: [he is] a coordinator and sponsor of murders, [he] meets with [I. T.] and resolves financial issues for the top officials of the Department of [the Security Service] in the Odessa Region ..."

13. The court further ordered the second applicant to publish an official apology in the newspaper.

14. In determining the amount of compensation to be paid to the claimant, the court considered the submissions of the latter and the information concerning the financial situation of the newspaper. It noted that its gross annual income was about UAH 22,000[2] and found it reasonable to order the applicants jointly to pay G. T. UAH 15,000[3] for

1. About 33,060 euros (EUR).
2. About EUR 3,511.
3. About EUR 2,394.

non-pecuniary damage. The applicants were also ordered to pay to the State Budget UAH 750[1] in court fees.

15. The applicants appealed. They maintained the submissions they had made before the first-instance court and also contended that the editorial board had not been registered as a legal entity pursuant to the relevant regulations on registration of the media and that the second applicant had not been appointed as editor-in-chief in accordance with the law. Thus, in their view, they could not take part in the proceedings.

16. The applicants further argued that invoking their civil liability was contrary to section 41 of the Press Act and section 17 of the Act on the State support of mass media and social protection of journalists, stating that they had not intended to defame G. T. and that, by publishing the material, they had wished to promote public discussion of the issues raised in that material which were of the high public interest. According to them, it was their duty to disseminate the material and the public had the right to receive it.

17. The second applicant also submitted that he had not authorised the publication of the material at issue and that the legislation did not provide for an obligation to apologise as a sanction for defamation.

18. On 14 September 2004 and 24 February 2005, respectively, the Odessa Regional Court of Appeal and the Supreme Court rejected the applicants' appeals and upheld the judgment of the first-instance court.

19. On 3 July 2006 the applicants and G. T. concluded a friendly-settlement agreement, pursuant to which the latter waived any claim in respect of the amount of compensation under the judgment of 7 May 2004. The applicants, on their part, undertook to cover all the costs and expenses relating to the court proceedings and to publish in *Pravoe Delo* promotional and informational materials at G. T.'s request, the volume of which was limited to the amount of compensation under the judgment.

20. In 2008 the applicants discontinued publishing *Pravoe Delo*.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Ukraine of 28 June 1996

21. Relevant extracts from the Constitution read as follows:

Article 32

"... Everyone is guaranteed judicial protection of the right to rectify incorrect information about himself or herself and members of his or her family, and of the right to demand that any type of information be rectified, and also the right to

1. About EUR 120.

compensation for pecuniary and non-pecuniary damage inflicted by the collection, storage, use and dissemination of such incorrect information."

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."

B. Civil Code of 1963 (repealed with effect from 1 January 2004)

22. 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 retracted 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 ...

A citizen or an organisation concerning whom material that does not conform to the truth and damages their interests, honour, dignity or reputation has been disseminated shall be entitled to demand compensation for pecuniary and non-pecuniary damage as well as a retraction of such information ..."

C. Civil Code of 2003 (in force from 1 January 2004)

23. The provisions of the Civil Code of 2003 pertinent to the case read as follows:

Article 16
Protection of civil rights and interests by a court

1. Every person has the right to apply to a court of law for the protection of his/her ... right and interest.

2. The means for the protection of civil rights and interests may include:

1) recognition of the right;

2) declaration of nullity of an act;

3) cessation of actions violating the right;

4) restoration of the situation which existed before the violation;

5) forced fulfillment of an obligation;

6) modification of legal relations;

7) discontinuance of legal relations;

8) compensation of [pecuniary] damage ...;

9) compensation of moral (non-pecuniary) damage;

10) declaration of unlawfulness of a decision, actions or inactivity of a State body ...

The court may give protection to the civil right or interest by other means envisaged by a contract or law.

..."

Article 277
Retraction of untrue information

"1. A physical person whose non-pecuniary rights have been infringed as a result of dissemination of untrue information about him or her and (or) members of his or her family, shall have the right to reply, and [the right to] the retraction of that information.

...

3. Negative information disseminated about a person shall be considered untrue if the person who disseminated it does not prove the contrary.

4. Untrue information shall be retracted by the person who disseminated the information ...

5. If the untrue information is contained in a document which has been accepted (issued) by a legal entity, that document shall be recalled.

6. A physical person whose non-pecuniary rights have been infringed in printed or other mass media shall have the right to reply, and also [the right to] the retraction of the untrue information in the same mass media, in the manner envisaged by law...

Untrue information shall be retracted irrespective of the guilt of the person who disseminated it.

7. Untrue information shall be retracted in the same manner as it was disseminated."

D. Information Act of 2 October1992

24. Relevant extracts from the Information Act provided, as worded at the material time, as follows:

Section 20. Mass media

"Printed mass media are periodical prints (press) – newspapers, magazines, bulletins – and occasional prints with a set circulation.

Audiovisual mass media are radio, television, cinema, audio, video records and so on.

The procedure of establishing ... of particular media shall be determined by the laws concerning such media."

Section 47. Liability for infringement of the legislation on information

"...

Liability for infringement of the legislation on information shall be borne by persons responsible for the following infringements:

...

dissemination of information that does not correspond to reality, defames the honour and dignity of a person ..."

Section 49. Compensation for pecuniary and non-pecuniary damage

"If physical or legal persons have suffered pecuniary or non-pecuniary damage caused by an offence committed by an entity engaged in informational activities, those responsible [for the offence] shall compensate [for the damage] voluntarily or pursuant to a court decision ..."

E. Printed Mass Media (Press) Act of 16 November 1992

25. Relevant extracts from the Press Act provide:

Section 1. Printed mass media (press) in Ukraine

"Printed mass media (press) in Ukraine, as referred to in this Act, are [defined as] periodical and continuing publications issued under a permanent name [at least] once a year pursuant to a certificate of State registration ..."

Section 7. Entities engaged in printed mass media activities

"Entities engaged in printed mass media activities shall include [their] founders (or co-founders), editors (or editors-in-chief), editorial boards ..."

Section 21. Editorial board of the printed mass media

"The editorial board ... shall prepare and issue printed mass media under the instructions of its founder (or co-founders).

The editorial board shall act on the basis of its organisational charter and shall implement the programme of the printed mass media approved by its founder (or co-founders).

The editorial board ... shall acquire the status of a legal entity from the day of State registration, which shall be carried out in accordance with the legislation of Ukraine."

Section 21. Editor (editor-in-chief) of the printed mass media

"The editor (or editor-in-chief) ... shall be the head of the editorial board, authorised by the founder (or co-founders).

The editor (or editor-in-chief) ... shall manage the editorial board's activities within his competence, as envisaged by its organisational charter, shall represent the editorial board in its relations with the founder (or co-founders), the publisher, authors, State organs, associations of citizens, and individual citizens, as well as before the courts and arbitration tribunals and shall be responsible for compliance with the [legislative] requirements as to the activities of the printed media, its editorial board ..."

Section 26. State registration of the printed mass media

"...All printed mass media in Ukraine shall be subject to State registration, irrespective of the area of its dissemination, circulation and the manner of its creation ..."

Section 32. Publishing data

"Every issue of printed mass media shall contain the following publishing data:

(1) name of publication ...

Distribution of [publications] without publishing data shall be prohibited."

Section 37. Retraction of information

"Citizens, legal entities and State organs, and their legal representatives shall have the right to demand that the editorial board of the printed mass media publish a retraction of information disseminated about them which does not correspond to reality or defames their honour and dignity.

If the editorial board does not have any evidence that the content published by it corresponds to reality, it must, if requested by the claimant, publish a retraction of such information in the next issue of the printed mass media or to publish the retraction on its own initiative ..."

Section 41. Grounds for liability

"Editorial boards, founders, publishers, distributors, State organs, organisations and associations of citizens shall be liable for infringements of the legislation on the printed mass media.

Infringements of Ukrainian legislation on the printed mass media are:

1) violations envisaged by section 47 of the Information Act ...

For such an infringement the guilty party shall be brought to disciplinary, civil, administrative, or criminal liability in accordance with the current legislation of Ukraine.

The journalist ... editor (or editor-in-chief) or other persons with whose permission the material which violates this Act has been published shall bear the same liability for abuse of the freedom of the printed mass media as the authors of that material."

Section 42. Indemnity from liability

"Editorial board and journalists are not liable for the publication of material that does not correspond to reality, defames the honour and dignity of citizens and organisations, infringes the rights and lawful interests of citizens, or constitutes abuse of the freedom of the printed mass media and the rights of journalists if:

1) the information has been received from news agencies or from the founder (co-founders) [of that media source];

2) the information is contained in a reply given in accordance with the Information Act to a request for access to official documents and to a request for written or oral information;

3) the information is a verbatim reproduction of official speeches of the officials of State organs, organisations and associations of citizens;

4) the information is a verbatim reproduction of material published by other printed mass media and contains a reference to [the latter];

5) the information contains secrets that are specifically protected by law, where the journalist has not obtained this information unlawfully."

F. State Support of Mass Media and Social Protection of Journalists Act of 23 September 1997

26. Relevant extracts from the Act provide:

Section 17. Liability for trespass or other actions against the life and health of a journalist and a journalist's liability for non-pecuniary damage caused by him

"... In the process of consideration by a court of a dispute concerning non-pecuniary damage between a journalist or mass media, as a defendant party, and a political party, electoral bloc, [or] an office holder (or office holders), as a claimant, the court may award compensation in respect of non-pecuniary damage only if the journalist or officials of the media [acted] intentionally. The court shall take into account the outcome of the use by the claimant of extrajudicial, in particular pre-trial opportunities for retraction of untrue material, defending of his honour and dignity and reputation, and settlement of the entire dispute. Having regard to the circumstances, the court may refuse compensation in respect of non-pecuniary damage.

The intention of the journalist and/or official of the media means his or their stance in regard to dissemination of information when the journalist and/or official of the media are aware of the untruthfulness of the information and have anticipated its socially injurious consequences.

The journalist and/or the mass media shall be released from liability for dissemination of the information that does not correspond to reality if the court establishes that the journalist acted in good faith and checked the information."

G. Resolution of the Plenary Supreme Court of Ukraine of 27 February 2009 on judicial practice in cases concerning the protection of the honour and dignity of a physical person, and of the reputation of a physical person and legal entity

27. The relevant extracts from the Resolution of the Plenary Supreme Court read as follows:

"26. According to Article 19 of the Constitution of Ukraine legal order in Ukraine is based on [the principle] according to which no one shall be forced to do what is not envisaged by the legislation. In its turn, Article 34 paragraph 1 of the Constitution of Ukraine guarantees everyone the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.

A court has no power to oblige a respondent to apologise to a claimant ... as forced apology is not envisaged by Articles 16 [and] 277 [of the Civil Code of 2003] as a means of judicial protection of honour, dignity, [and] business reputation [in case of] dissemination of untrue information."

H. Judicial practice of the Supreme Court in cases concerning the application of Articles 16 and 277 of the Civil Code of 2003

28. The Supreme Court confirmed the Plenum's approach in a defamation case, having quashed the lower courts' decisions by which a respondent was ordered, *inter alia*, to apologise as not based on law. In

particular, the relevant extract of the Supreme Court's judgment (dated 17 June 2009) reads as follows:

> "...
>
> The court[s] are not entitled to oblige a respondent to apologise to a claimant in one or another form, as Articles 16 [and] 277 [of the Civil Code of 2003] do not provide for forced apology as a means of judicial protection of honour, dignity, [and] business reputation [in case of] dissemination of untrue information; compulsion of a person to change his/her beliefs is an interference with the freedom of speech and expression guaranteed by the Constitution of Ukraine and Article 10 of the Convention..."

II. RELEVANT COUNCIL OF EUROPE AND INTERNATIONAL MATERIAL

A. Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet

29. At their 1010th meeting on 7 November 2007 the Ministers' Deputies considered essential aspects of the use of new information and communication technologies and services, in particular the Internet, in the context of protection and promotion of human rights and fundamental freedoms. They acknowledged the increasingly important role the Internet was playing in providing diverse sources of information to the public and the people's significant reliance on the Internet as a tool for communication.

30. It was noted however that the Internet could, on the one hand, significantly enhance the exercise of human rights and fundamental freedoms, such as the right to freedom of expression, while, on the other hand, the Internet might adversely affect other rights, freedoms and values, such as the respect for private life and secrecy of correspondence and for the dignity of human beings.

31. The Ministers' Deputies adopted recommendations to the Council of Europe's member States with regard to the governance of the Internet. These included recommendation to elaborate a clear legal framework delineating the boundaries of the roles and responsibilities of all key stakeholders in the field of new information and communication technologies and to encourage the private sector to develop open and transparent self- and co-regulation on the basis of which key actors in this field could be held accountable.

B. Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, adopted on 21 December 2005

32. The growing importance of the Internet as a vehicle for facilitating in practice the free flow of information and ideas was also recognised in the Joint Declaration issued by Mr A. Ligabo, Mr M. Haraszti, and Mr E. Bertoni. They stressed the need for strict application of international guarantees of freedom of expression to the Internet. In the context, it was stated that no one should be liable for content on the Internet of which they were not the author, unless they had either adopted that content as their own or refused to obey a court order to remove that content.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

33. The applicants complained that their right to freedom of expression had been violated in that the courts had allowed G. T.'s claim concerning the content published in *Pravoe Delo* on 19 September 2003. They stated that the interference had neither been in accordance with the law nor necessary in a democratic society. The applicants 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

34. The Government submitted that the applicants could not claim to be victims of a violation of Article 10 of the Convention, as the interference

with their right to freedom of expression had been based on the decisions of the domestic courts. The applicants did not complain under Article 6 § 1 of the Convention that the impugned court proceedings had been unfair, there had been no irregularities in these proceedings, and the Court had limited jurisdiction regarding the assessment of facts and the application of law by domestic courts. On these grounds, they invited the Court to declare the application incompatible *ratione personae* with the provisions of the Convention.

35. The applicants disagreed.

36. The Court considers that the Government's objection is closely linked to the substance of the applicants' complaints under Article 10 of the Convention and that it must therefore be joined to the merits.

37. The Court further notes that the application 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. Submissions of the parties

(a) The applicants

38. The applicants argued that the domestic legislation concerning the liability of the press for defamation lacked clarity and foreseeability and that the domestic courts had disregarded the relevant legislative guarantees against punishment for unverified statements made by journalists. They submitted that the courts had not taken into account the fact that they had not disseminated information about G. T., that the second applicant had not given his permission for the publication of the material, that they had sufficiently distanced themselves from the publication, and that G. T. had not used the opportunity of asking the editorial board for a retraction before bringing his defamation claim before the courts.

39. The second applicant also contended that Ukrainian law did not provide for an obligation to apologise as a sanction for defamation.

40. The applicants further submitted that they had disseminated the material, which had already been published on the Internet, with a view to promoting further discussion of the important political issues raised in the material. They stated that the amount of compensation which they had been required to pay had been too high given the annual income of the newspaper, and had placed a disproportionate burden on them. In this context, they stated that they had had to discontinue publishing *Pravoe Delo*.

(b) The Government

41. The Government submitted that the interference with the applicants' right to freedom of expression had been lawful in that it had been based on the clear, accessible and foreseeable provisions of the domestic law, namely, on Article 7 of the Civil Code of 1963, section 47 of the Information Act of 2 October 1992, and sections 1, 32 and 42 of the Printed Mass Media (Press) Act of 16 November 1992, as applied by the national courts in the applicants' case.

42. The Government further submitted that the interference had been aimed at protecting the honour, dignity and business reputation of a private person, whose rights had been prejudiced by the publication at issue. According to them, this had been a legitimate aim within the meaning of Article 10 § 2 of the Convention, which the applicants did not deny.

43. The Government argued that the publication had contained serious factual allegations directed against a prominent public figure who had contributed to the development of sports in Ukraine. The applicants had failed to prove these allegations. The fact that they had reproduced the material obtained from a website had not been sufficient to release them from such an obligation, as the legal status of information derived from the Internet had not been determined under the domestic law. Therefore, the Government stated that the interference had been necessary in the present case.

44. They also submitted that the applicants had not actually been required to pay the compensation awarded by the courts to the claimant, as they had settled the matter at the stage of enforcement of the judgment of 7 May 2004. According to the Government, it had not been proved by the applicants that they had discontinued publishing their newspaper because of the interference at issue.

45. Relying on the Court's decision as to the admissibility of *Vitrenko and Others v. Ukraine* ((dec.), no. 23510/02, 16 December 2008), the Government contended that the court's order to apologise had not been contrary to the principles embodied in Article 10 of the Convention.

46. On the above grounds, the Government stated that the impugned interference had not been disproportionate.

2. The Court's assessment

(a) Whether there was an interference with the right to freedom of expression

47. The Court observes that the publication at issue involved defamatory statements of fact. According to the findings of the civil courts, it was stated that a public figure, the President of the Ukraine National Thai Boxing Federation, was a member of an organised criminal group and "a coordinator and sponsor of murders". The applicants had failed to show that

those statements were true and the courts ordered them to publish a retraction and apology and to compensate the person concerned for the non-pecuniary damage caused by the publication.

48. The Court considers that the courts' decisions constituted an interference with the applicants' right to freedom of expression.

49. The Court reiterates that its task in exercising its supervisory function under Article 10 of the Convention is to look at the interference complained of in the light of the case as a whole and, in particular, to determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). This inevitably entails a review of the decisions taken by the courts at the domestic level, irrespective of whether any complaints have been raised concerning the courts' compliance with the procedural guarantees under Article 6 of the Convention. Therefore, the Court dismisses the Government's objection as to the applicants' victim status.

50. The Court will now examine whether the interference was justified under Article 10 § 2 of the Convention.

(b) Whether the interference was prescribed by law

51. The Court notes that the first and most important requirement of Article 10 of the Convention is that any interference by a public authority with the exercise of the freedom of expression should be lawful: the first sentence of the second paragraph essentially envisages that any restriction on expression must be "prescribed by law". In order to comply with this requirement, interference does not merely have to have a basis in domestic law. The law itself must correspond to certain requirements of "quality". In particular, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, for example, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 41, ECHR 2007-XI).

52. The degree of precision depends to a considerable extent on the content of the instrument at issue, the field it is designed to cover, and the number and status of those to whom it is addressed (see *Groppera Radio AG and Others v. Switzerland*, 28 March 1990, § 68, Series A no. 173). The notion of foreseeability applies not only to a course of conduct, of which an applicant should be reasonably able to foresee the consequences, but also to "formalities, conditions, restrictions or penalties", which may be attached to such conduct, if found to be in breach of the national laws (see, *mutatis mutandis*, *Kafkaris v. Cyprus* [GC], no. 21906/04, § 140, ECHR 2008-...).

53. Turning to the circumstances of the present case, the Court observes that the applicants' submissions regarding the question of the lawfulness of

the interference essentially concern two specific issues, namely, the alleged lack of clarity and foreseeability of the relevant legislative provisions concerning journalists' specific safeguards and the alleged absence of legal grounds for an obligation to apologise in cases of defamation.

(i) Measures envisaged by Ukrainian law in cases of defamation

54. As regards the latter issue, the Court observes that Ukrainian law provides that, in cases of defamation, injured parties are entitled to demand a retraction of untrue and defamatory statements and compensation for damage. Both measures were applied in the applicants' case. However, in addition to those measures, the courts ordered the second applicant to publish an official apology in the newspaper. The Court observes that such a measure was not specifically provided for in the domestic law.

55. The Court has already dealt with a similar situation in a case against Russia. In that case it was prepared to accept that the interpretation by the domestic courts of the notions of retraction or rectification under the relevant legislation as possibly including an apology was not such as to render the impugned interference unlawful within the meaning of the Convention (see *Kazakov v. Russia*, no. 1758/02, § 24, 18 December 2008).

56. However, in contrast to the latter case, the present case contains no evidence or, at the least, a persuasive argument that Ukrainian courts were inclined to give such a broad interpretation to the legal provisions concerning the measures applicable in cases of defamation or that that was their general approach in such cases.

57. The Court further observes that, despite the second applicant's specific and pertinent complaints in that connection, the domestic courts failed to give any explanation for the obvious departure from the relevant domestic rules (see paragraph 17 above). The Government's submissions in that regard did not clarify the issue either.

58. As it appears from the relevant domestic judicial practice, though subsequent to the events at issue, imposition of an obligation to apologize in defamation cases may run counter the Constitutional guarantee of freedom of expression (see paragraphs 27-28 above).

59. In these circumstances, the Court finds that the court's order to the second applicant to apologise was not prescribed by law and that accordingly there has been a violation of Article 10 of the Convention in that respect.

(ii) Journalists' specific safeguards in Ukrainian law

60. The Court observes that the publication at issue was a verbatim reproduction of material downloaded from a publicly accessible internet newspaper. It contained a reference to the source of the material and comments by the editorial board, in which they formally distanced themselves from the content of the material.

61. Ukrainian law, specifically the Press Act, grants journalists immunity from civil liability for verbatim reproduction of material published in the press (see paragraph 25 above). The Court notes that this provision generally conforms to its approach to journalists' freedom to disseminate statements made by others (see, for instance, *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298; and *Thoma v. Luxembourg*, no. 38432/97, § 62, ECHR 2001-III).

62. However, according to the domestic courts, no such immunity existed for journalists reproducing material from internet sources not registered pursuant to the Press Act. In this connection, the Court observes that there existed no domestic regulations on State registration of internet media and that, according to the Government, the Press Act and other normative acts regulating media relations in Ukraine did not contain any provisions on the status of internet-based media or the use of information obtained from the Internet.

63. It is true that the Internet is an information and communication tool particularly distinct from the printed media, in particular as regards the capacity to store and transmit information. The electronic network serving billions of users worldwide is not and potentially cannot be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to the technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned.

64. Nevertheless, having regard to the role the Internet plays in the context of professional media activities (see paragraphs 29-32 above) and its importance for the exercise of the right to freedom of expression generally (see *Times Newspapers Ltd v. United Kingdom (nos. 1 and 2)*, no. 3002/03 and 23676/03, § 27, 10 March 2009), the Court considers that the absence of a sufficient legal framework at the domestic level allowing journalists to use information obtained from the Internet without fear of incurring sanctions seriously hinders the exercise of the vital function of the press as a "public watchdog" (see, *mutatis mutandis*, Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216). In the Court's view, the complete exclusion of such information from the field of application of the legislative guarantees for journalists' freedom may itself give rise to an unjustified interference with press freedom under Article 10 of the Convention.

65. The Court further observes that under Ukrainian law journalists may not be required to pay compensation in defamation cases if they did not disseminate the untrue information intentionally, acted in good faith and

made checks on such information, or if the injured party failed to use the available possibilities to settle the dispute before going to court (see paragraph 26 above). In the domestic proceedings, the applicants explicitly raised the defence of qualified privilege under the latter provision. In particular, they argued that they had no malicious intent to defame the claimant by the publication of the material in question and that the public had an interest in receiving the information. Furthermore, they argued, that by reproducing the material previously published on the Internet, their intention was to promote debate and discussion on political matters of important public interest. They also argued that the claimant had not taken any steps to settle the dispute with the applicants despite the fact that in the same publication they had invited any person concerned to comment on it. However, their plea was entirely ignored by the courts.

66. Therefore, the Court finds that, given the lack of adequate safeguards in the domestic law for journalists using information obtained from the Internet, the applicants could not foresee to the appropriate degree the consequences which the impugned publication might entail. This enables the Court to conclude that the requirement of lawfulness contained in the second paragraph of Article 10 of the Convention was not met.

67. In these circumstances, the Court does not consider it necessary to deal with the parties' remaining submissions concerning this provision or to examine the proportionality of the interference at issue.

68. Accordingly, there has been a violation of Article 10 of the Convention as regards this aspect of the case.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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. Submissions of the first applicant

70. The first applicant submitted that the appropriate just satisfaction in the case would be a finding of a violation of Article 10 of the Convention and an indication of general measures to be adopted by Ukraine to bring its legislation and judicial practice into compliance with "European standards of freedom of expression" as regards the use of "socially important information, available on the Internet, the credibility of which is open to question."

71. The Government did not comment on this aspect of the case.

72. Having regard to the circumstances of the present case and the conclusions the Court has reached under Article 10 of the Convention (see paragraphs 64-68 above), it does not consider it necessary to examine this case under Article 46 of the Convention with a view to indicating specific measures that might be taken in order to put an end to a violation found in the case (see, *mutatis mutandis*, *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V). The Court also notes that there is no call to award the first applicant any sum for just satisfaction.

B. Submissions of the second applicant

1. Damage

73. The second applicant claimed 7,000 euros (EUR) for non-pecuniary damage.

74. The Government contested the second applicant's claim.

75. The Court considers that the second applicant has suffered some distress and anxiety on account of the violations of his right to freedom of expression. Ruling on an equitable basis, as required by Article 41 of the Convention, it awards him EUR 6,000 in this connection.

2. Costs and expenses

76. The second applicant made no claim as to costs and expenses. Therefore, the Court makes no award under this head.

3. Default interest

77. 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. *Decides* to join to the merits the Government's objection concerning the applicants' victim status and rejects it;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 10 of the Convention on account of the domestic courts' order to the second applicant to publish an official apology;

4. *Holds* that there has been a violation of Article 10 of the Convention on account of the applicants' punishment for the impugned publication;

5. *Holds*
   (a) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national 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.

6. *Dismisses* the remainder of the second applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Registrar	Dean Spielmann, President