

**ANALYSIS OF THE CASE**  
***UKRAINIAN MEDIA GROUP v. UKRAINE***

**JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS**  
**ISSUED ON 29 MARCH 2005**

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## **Introduction**

This Analysis considers the judgment of 29 March 2005 of the European Court of Human Rights (hereinafter referred to as the “Court”) in the case of *Ukrainian Media Group v. Ukraine*. The case concerns the defamation and insulting of a former public figure during a television interview by a journalist. The Applicant submitted in his application to the Court that his conviction under criminal defamation norms by national authorities amounted to a violation of his right of freedom of expression as a journalist under Article 10 of the Convention. The respondent Government claimed that freedom of expression does not provide the Applicant an absolute right of expression and that it can be limited under certain circumstances and conditions under Article 10(2) of the Convention.

This Analysis aims to study the facts of the case, including a thorough examination of the applicant’s complaints and the Ukrainian Government’s arguments. The Analysis will also provide an overview of the specific approaches of the European Court regarding the interpretation of the rights and freedoms in question. However, the Analysis will not specifically address the issue of just satisfaction. The analysis will be carried out by applying a checklist which the Court uses when examining violations of each ECHR right and freedom. The Analysis will also highlight the significant features of the case which played an important role and became the principal guide to the interpretation of the rights and freedoms guaranteed by the European Convention.

This Analysis is educational in character and is primarily designed to enable legal professionals, including judges, lawyers, advocates, legal service providers and others involved in the protection of human rights - including law students - to identify the criteria and the standards that the Court follows when interpreting the rights and freedoms guaranteed by the Convention

## CASE ANALYSIS

This case concerns defamation and libel of public figures by a journalist. In the analysis of the *Tammer* case, much was mentioned about the standards and principles applied by the European Court in dealing with criminal defamation cases. In order to avoid repeating the topic, only relevant ECHR case law will be provided here without going much into the details of ECHR methodology when assessing the facts and the arguments of cases on defamation and libel.

### 1. Relevant case-law

The first case in which the Court had to take a decision on the merits in respect of freedom of expression and information in the press was in *The Sunday Times v United Kingdom* (1979) 2 EHRR 245. In this case, the Court held that there had been a violation of Article 10 by reason of an injunction restraining the publication in *the Sunday Times* of an article concerning a drug and litigation linked to its use. The injunction, based on the English law of contempt of court, was not found to be “necessary to democratic society”.

In *Lingens v. Austria* (1986) 8 EHRR 4078, the Court defined the limits of “acceptable criticism”, which, according to the Court, are wider in respect of a politician than for a private individual, because the former knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.

In defamation cases, the Court has distinguished between fact and value judgments. “The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof”<sup>1</sup> On this basis the Court found that the fine imposed on the applicant for having defamed a politician in a newspaper article (Article 111 of the Austrian Criminal Code) constituted an unjustified interference with his freedom of expression guaranteed by Article 10.

In the *Dalban*<sup>2</sup> case of 1999, the Court ruled that the criminal conviction of a journalist for defamation following the publication of several articles accusing public personalities of involvement in fraud and possible corruption constituted a violation of Article 10 of the Convention. The Court ruled against the idea that “*the journalist should be debarred from expressing critical value judgments unless he or she can prove their truth*” (paragraph 49). In this case the disputed articles did not concern the private lives of public personalities but their behaviour and attitudes when discharging their duties. Further, there was no proof that the description of events given in the articles was totally untrue and was designed to fuel a defamation campaign. Accordingly, the Court found that convicting the applicant of a criminal offence amounted to disproportional interference with the exercise of the journalist’s freedom of expression.

In the *Lopes Gomes Da Silva v. Portugal* (28 Sep 2000) case, a newspaper director was found guilty of defamation because of terms he used in an editorial about a journalist who was a candidate in municipal elections. In this case the opinions expressed by the applicant were clearly part of a political debate on matters of general interest. According to the Court the

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<sup>1</sup> Lingens judgment of 8 July 1986, Series A, No.103, para. 41.

<sup>2</sup> Dalban v. Romania, judgment of 28 September 1999, Reports 1999 – vi, para 49

disputed article could be considered polemical but did not constitute a gratuitous personal attack, as the author gave an objective explanation. The Court stressed that “political invective often spilled over into the personal realm; that was one of the risks of politics and the open discussion of ideas that characterized a democratic society”. The Court ruled that the newspaper director was acting in accordance with the rules of journalism because he formed his own idea by comparing the editorial concerned with the statements made by the person referred to in it. The Court found that the sentence against the journalist was not proportionate to the legitimate aim pursued and therefore constituted a violation of Article 10.

On 25 July 2001, the Court made a decision in the *Perna*<sup>3</sup> case concerning the conviction of a journalist for defamation following a statement criticizing a judge. In this article, the applicant questioned the senior civil servant’s political militancy, which he likened to an “oath of obedience” He also accused the judge of instituting proceedings against a statements for “belonging to the Mafia” without any proof. The Court considered this statement as a critical opinion. Although somewhat exaggerated, the journalist’s comments should have been protected. According to the Court, the judge’s political activism was a threat to the image of impartiality and independence the justice system should project, and thus raised an important issue of general interest. The Court ruled that “*the sanctions against the press must be strictly proportionate and prompted by assertions which did indeed overstep the limits of acceptable criticism, while safeguarding assertions which may enjoy the protection of Article 10*” (paragraph 46). Accordingly, the Court concluded that there had been a violation of Article 10 insofar as the applicant had been convicted in part for his comments concerning the judge’s political activism.

In March 2001, the Court issued the judgment in *Thoma* case<sup>4</sup>, concerning the conviction of a journalist for failing in his duty to impart fair information after he quoted excerpts from an article questioning the honesty of a body of civil servants without distancing himself from the comments. The applicant’s programme concerned a matter of general interest. In the judgment, the Court declared that:

*A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation was not reconcilable with the press’s role of providing information on current events, opinions and ideas”* (paragraph 64).

In this case, the journalist took the precaution of mentioning that he was beginning a quotation and of citing the author. He described the article by his fellow journalist as “as strongly worded”. He also asked the third party what he thought of the publication concerned. According to the Court, the grounds given for the applicant’s conviction were not sufficient to justify the impugned interference. The Court found that there had been a violation of Article 10.

There is a substantial volume of Court case law concerning Article 10 regulating the principles of defamation and libel of public officers and figures by journalists. As mentioned above, detailed analyses of the Court’s methodology in applying the relevant Article 10 principles were discussed in the *Tammer* case. Therefore, the analyses of the *Tammer* case

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<sup>3</sup> Perma judgment of 27 July 2001

<sup>4</sup> Thoma judgment of 29 March 2001, para 64

may also serve as guidance for a complete view of the assessment of this case, especially considering that both cases concern defamation and libel norms by journalists.

## **2. Country Profile**

Ukraine made a declaration of sovereignty on 16 July 1990. On 24 August 1991, independence was declared in Ukraine and received massive public support in the referendum of 1 December 1991. The Ukrainian Parliament was granted special guest status with the Parliamentary Assembly of the Council of Europe on 16 September 1992. Parliamentary and Presidential elections were held in Ukraine in the spring and summer of 1994. Assembly observers of the first round of the parliamentary elections concluded that

*“the electoral process was fairly conducted and the election was free and fair, despite an apparently flawed electoral law...”<sup>5</sup>*

A partnership and cooperation agreement between Ukraine and the European Union was signed on 14 June 1994.

Ukraine applied to join the Council of Europe on 14 July 1992. By Resolution (92) 29 of 23 September 1992, the Committee of Ministers asked the Parliamentary Assembly to give an opinion.

On 26 September 1995, the Parliamentary Assembly recommended the Committee of Ministers to invite Ukraine to become the member of the Council of Europe. The Monitoring process over Ukraine by PACE is still ongoing. Of special concern to the PACE Monitoring Committee are the slowness of the process of Constitutional reforms, the independence of judiciary, the systematic persecution of journalists and independent media companies and conditions of detention. On 29 September 2003, PACE issued Resolution 1346 which, among other things, mentioned the serious draw back of authorities in ensuring free and pluralistic media in the country, the non-conformity of domestic rules and practice to Convention principles of freedom of speech and journalistic freedom, especially the efforts of the Presidential office in controlling the print and broadcasting media. The situation dramatically changed after the orange revolution of 2004, after which the Ukrainians regained the trust of the international community in its commitment to follow democratic principles.

## **3. Friendly settlement**

One thing that distinguishes this case from many other cases argued before the European Court is in that the Court, after inviting the parties to propose friendly settlement, decided to reject the settlement proposed by the parties and continue the examination of the case for the judgment. This is not something that the Court does very often. Note that the parties had already reached a settlement decision, however, although the Court is mostly interested in settling the case rather than issuing a judgment, it decided that for some important reason the judgment was more important in this case than the settlement of the dispute.

The friendly settlement procedure (Articles 37-39 of the Convention and the Rule 62 of the Court) provides the respondent Government and the applicant with an opportunity to resolve

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<sup>5</sup> Parliamentary Assembly Opinion of 26 September 1995 (26<sup>th</sup> Sitting).

a dispute. In cases where a settlement is reached by the parties, the Court strikes the case out of the list of cases. A settlement can be reached at any stage of Court proceedings. Thus, the Court is usually the initiator of the settlement procedure between the parties. However, the Court has a minor role as a decision maker in settlement proceedings. It just transfers the parties' proposals to each other and checks that due process is maintained. .

When a friendly settlement is proposed, the Government usually undertakes to amend the legislation while providing the Applicant with monetary compensation. For example, in *JT v. UK*, No.26494/95, the Government proposed the settlement terms, under which it undertook to amend the domestic laws with respect to detainees. The Applicant also received compensation in the amount of £500, together with her reasonable calculated and actually incurred legal costs.

Friendly settlement negotiations are confidential. The details about the negotiations cannot be made public. The parties cannot include arguments about the substantive issues in dispute in the friendly settlement proposals. This is something that the Court expressly informs the parties the first time that it proposes settlement of the dispute.

As mentioned above, the Court is usually willing to settle the case that proceeds to judgment. First, this is because the Court is usually acting on equity basis. Second, because the settlement usually decreases the ever-increasing workload of the Court.

However, despite its willingness to reach settlement, in rare cases the Court may stop the settlement procedures at any stage of its development if it thinks that there is a good cause under Article 37(1) of the Convention for further examination of the case in a final judgment. The Article 37(1) provides:

1. *The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that*
  - a *the applicant does not intend to pursue his application; or*
  - b *the matter has been resolved; or*
  - c *for any other reason established by the Court, it is no longer justified to continue the examination of the application.*

*However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.*

- 2 *The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.*

According to the materials of the case, the Court was very concerned about the state of the journalistic freedom, and the relevant laws and practice in Ukraine. The Convention is considered violated not only by certain actions of state bodies, but also by non-compliance of domestic laws and practice to Convention norms. The Court has repeatedly stated that the latter is a more important goal to achieve than recognition of a violation of an applicant's Convention rights via a judgment. If the Court does not pursue this goal in a stronger form, it

will face a devaluation of Convention values. The member states are sometimes more interested in continuing to provide just satisfaction from the state budget rather than changing the domestic legislation and practice, bringing them into line with Convention norms. One example of such practice is the Turkey. The Court has issued numerous judgments regarding Turkey and the Government is more eager to provide monetary compensation to the victims than to take steps to change the domestic rules and stop the practice of human rights violations practice, especially against such ethnic minorities as the Kurds.

It appears that the Court was very concerned about the slowness of free speech development in Ukraine, especially in the sphere of persecution of the media and journalists. The very fact that the Court made wide reference to international documents proves this. Resolution 1346 of the Parliamentary Assembly on honoring of obligations and commitments by Ukraine, invoked in paragraph 19 of the judgment, indicates PACE's concern to "*the very high incidence of violence against journalists...continued abuse of power...taxation, regulations and police powers in order to intimidate opposition media*" (para 19). The European Parliament Resolution on Ukraine of 2004 expressed concern at the "*increasing number of serious violations against independent media...such as direct pressure and intervention from official services...arbitrary administrative and legal actions against television stations and other media outlets and harassment of, and violence against journalists...*". (para 20). The above and several other documents used in the case gave the Court sufficient basis to decide that a judgment against Ukraine was more important than a friendly settlement which, as usual, reflects only the narrow interests of the parties.

The factors which the Court decided to refer to Article 37(1) included the "importance of the issue raised by the case, the terms of settlement proposed by the parties and whether the issue had previously been considered by the Court.

We will never know the terms of the settlement proposed by parties because they are considered confidential under Article 38, which provides the following:

*Article 38 – Examination of the case and friendly settlement proceedings*

- 1 *If the Court declares the application admissible, it shall*
  - a *pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;*
  - b *place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.*
- 2 *Proceedings conducted under paragraph 1.b shall be confidential.*

Further, the issue of journalistic freedom had never been handled by the Court before. In addition, in considering that Ukraine was one of the emerging democracies from CIS region, that journalistic freedom is one of the main components of the free speech principle and that Article 10 provides special protection to journalistic freedom, the Court would definitely have a good reason to stop the case settling and deliver a judgment, which would definitely give more to Ukraine as an emerging democracy. Therefore, despite the fact that the Government

and the Applicant reached a settlement, the Court rejected it on 5 October 2004. The Court indicated in its decision regarding the rejection that «*it took note of the serious nature of the complaints made...regarding the alleged interference with the applicant's freedom of expression*» and therefore it did not find it appropriate to strike the application out of the list of its cases. Further, the Court noted that the special circumstances of the case regarding the respect of human rights required the further examination of the application on its merits (para 36).

Finally, the contention that the non-conformity of domestic laws to Convention norms was the very reason, or as indicated by Court, the «serious nature of the complaints », why the Court rejected the settlement of the parties, is proved by the standing of the Court where it broadened the argument of Applicant in paragraph 55 of the judgment. Whilst the Applicant's claim was directed solely against the judgments of domestic courts as unjustified interference into his rights, the Court however broadened the line of arguments by including the non-compatibility of «domestic norms and practice» to «Convention law and practice under Article 10(2)» as another issue to be handled under the judgment (see para 55). As will become obvious from the text of the judgment, the Court was in particular concerned that the domestic laws of Ukraine did not separate the value judgment from factual statement, which was a matter of «serious nature» that caused the Court to deliver a judgment rather leaving it to be settled between the parties.

#### **4. Court's finding**

The Applicant alleged before the Court that the judgments of the Ukrainian domestic courts ordering the Applicant to acknowledge the untruthfulness of the impugned media statement, to refute the statements and pay compensation for non-pecuniary damage (under Armenian laws and practice – “moral damage”), were in violation of his Article 10 rights as the above measures were not a) “prescribed by law”, b) did not follow a legitimate aim and c) were not necessary to democratic society.

##### *4.1 Prescribed by law*

Under Convention case-law, the notion “quality” of law is the inherent part of principles of predictability and accessibility of the law. In short, in order for a legal norm to be considered to conform with the Convention, it must be sufficiently precise, accessible and formulated with sufficient precision in order to be able to regulate actions or conduct to avoid liability or responsibility.

The Applicant argued before the Court that the provisions of the Civil Code and the Media Act were not sufficiently clear regarding the difference between factual statement and value judgment. Therefore, the Applicant argued he was not in position to foresee the possible legal liability in reading domestic laws when making critical statements or expressing critical opinions about public figures or politicians in his articles. In developing this line of argument, the Applicant contended that if the case was decided by the European Court, it would have come to a different opinion since the Court under its case-law differentiates between the value judgment and factual statements. The mentioned gap in domestic law and practice made it impossible for him to express critical opinions because the courts would require to prove the truthfulness of the statements, whereas “if the statements about the facts can be proved, the value judgments are susceptible to proof” (*Lingens v. Austria*, para 46).

The Government in its turn brought to the attention of the Court several domestic court judgments to prove that domestic case-law was in compliance with Convention norms. In addition, the Government contended that in making decisions, the domestic courts used to apply the Convention principles such as the “proportionality test”, or the “relevancy and sufficiency” of the measures applied to limit the Convention rights. In sum, the Government contended that domestic courts were widely using the Convention principles and in doing this they managed to strike a fair balance between the conflicting rights of the freedom of expression and the protection of dignity, honor, reputation and the rights of others under Article 10(2).

It has to be noted that the respondent Government was clever to bring examples from domestic practice. It is true that the Court does not rule “in abstract” but only on the basis of the factual circumstances of the given cases. However, in the *Tammer* case we see how widely the Court commented on domestic courts’ decisions following the Convention principles. Such arguments strengthen the claim. It is quite possible that the very fact of wide reference to domestic case-law by the Government was the reason why the Court ruled that the interference was “prescribed by law”. The Court ruled that, even if we assumed that domestic case-law was not in conformity with the Convention principles, however, the same notion cannot be applied to the issue of “foreseeability” of the legal norms. These decisions were accessible to the Applicant. Therefore, the Applicant was able to use them as “guidelines” for regulating his conduct and avoiding responsibility in making critical comments. As the Court ruled.

*“...the mere allegation that the case-law of the Ukrainian courts or the part concerning these issues was, in the applicant’s view, not in conformity with the Court’s case-law may be criticized, but does not affect the issue of foreseeability”*

The Court expressly mentioned after this ruling that Ukraine had considerable domestic case-law on defamation and libel cases where the facts of the case concern defamation and libel and where the critical comments were in the form of factual statements and value judgments. It was specifically on this basis that the Court decided that the Applicant had in fact sufficient means in order to be aware that the impugned remarks could possibly amount to insult and therefore potentially entail liability.

#### *4.2. Legitimate aim*

On the basis of the same arguments, the Applicant contended that the interference with his rights did not pursue a legitimate aim under Article 10(2). In particular, he argued that the domestic courts failed to distinguish between value judgment and factual statement. In addition, the Applicant argued that the critical opinion was made in connection with the plaintiffs position as public figures and their public activities whereas their private life was not subjected to criticism. The Court did not accept this argument. The Court has ruled previously that the legitimate aim of “protection of reputation and the rights of other” under Article 10(2) concerns “everybody” acting both in the capacity of “public figures” and “private individuals”. In respect of political figures, as is the case in this judgment, the Court ruled in *Oberschlick* case that “a politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity but the requirements of that

*protection have to be weighed against the interest of open discussion of political issues”.*<sup>6</sup> In light of the above finding of the Court, the arguments of the Applicant were not well-founded. It is true that the limits of acceptable criticism vary with respect to private citizens and politicians or public figures. However, that does not change the general approach that the protection under Article 10 applies to “everybody”. Therefore, it would be unacceptable to deprive certain groups from this protection rather than defining different levels of protection.

#### *4.3. Necessary to democratic society*

As in most defamation and libel cases before the Court, the most important submission and arguments were made under the principle of “necessary to democratic society”. As indicated above, the Court with its own initiative broadened the claim of the Applicant by reviewing the conformity to Convention norms of not only the measures of the interference, but also domestic laws and practice. The Court expressly mentioned this approach in paragraphs 55 and 56 of the judgment.

##### *4.3.1. Assessment of domestic law and practice.*

The Court carefully examined domestic laws and practice provided in the Human Rights Report of 2003, the US State Department report of 2003 and the research of Article 19 on the Freedom of Press in Ukraine PACE documents.

The above reports provided general information about the various forms and manners of interference by state authorities in limitation of journalistic freedom. Among such methods, the most popular were defamation lawsuits by government bodies for alleged damage to a “person’s honour and integrity”. As usual, in those lawsuits the amount of damages ordered by courts reached “astronomical” figures. Such disproportional amount of damages against “alleged libel” were an effective tool in the hand of state bodies to silence independent media. According to an Article 19 report, “in 1999 there 2258 suits against the media, for more than UAH 90 billion, of which approximately 55 percent were brought by public officials.

In addition to the above, the legislative framework provided favorable conditions for bringing libel claims in respect of any critical publication against politicians. The Civil Code provided that negative information about a person shall be considered untrue unless the person who spread the information proves to the contrary. The “negative information” is defined to be “any form of criticism or description of a person in a negative light. Article 19 interpreted this clause as “turning the reality on its head” to the extent that any information which is true but sounds negative will be considered false. Thus, an information or opinion about possible corruption would be easily qualified as “negative” information which would provide a basis for initiating proceedings against the journalist. In addition, the legislator put the burden of proof on the person “who spread the information”, i.e. the journalist, while the international norms provide that the plaintiff should bear the burden of proof. Further, under the Civil Code the non-pecuniary (moral) damage is paid by the person who caused the damage to the reputation, unless that person cannot prove that moral damage was not his/her fault. Thus, the law places an additional burden of proof on the journalists.

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<sup>6</sup> *Oberschlick v. Austria*, ECHR 23 May 1991. See also *Oberschlick (2)* ECHR 1 July 1997

Among the positive aspects of Ukrainian legislation are a few “innovations” in the legislation, such as the limitation imposed on public bodies to claim only refutation instead of compensation in libel cases, or the inclusion of “reasonable publication” test described in detail in the *Tammer* case. Further, the legislator provided that moral damage can be imposed only if it is proved that the journalist was acting with malicious intent – the burden of proof in this is put on the plaintiff. However, those changes were mostly cosmetic in nature and they could not yet bring positive changes in domestic practice due to the absence of political will to bring defamation laws in line with international norms.

From what was said above about legislation, one may conclude that Ukrainian laws did not distinguish between factual statement and value judgment, where the latter flows from expression of Article 10(1) about freedom to impart opinion. This fact is the core of the legal dispute in the subject case. As the Court stated in paragraph 59, “the Ukrainian law on defamation...referred uniformly to “statements”...and proceed from an assumption that any statement was amenable to proof in civil proceedings”. This finding is also proved by Article 277(3) of the Civil Code, under which “any negative information disseminated about a person shall be considered untruthful”. Thus, the expression “any information” covers both factual statements and opinions, whereas both types of statements enjoy Article 10 protection.

The culmination of the dispute between the Court and the respondent Government under conformity of domestic laws and practice to Convention reached in paragraph 61 of the judgment. It appears that the respondent Government, as indicated above, had brought several domestic court judgments to the Court in order to prove that at least the courts in Ukraine follow the Convention principles in making judgments. In particular, the respondent Government claimed that the courts follow the Convention principles by not allowing compensation for moral damage merely for critical opinion. The Court took a note of such positive development. However, the Court assessed this positive development by domestic courts in the context of existing legal norms that are very restrictive and still provide potential risk to journalists. In the instant case, according to the Court, the existing domestic laws, notwithstanding positive developments in case-law, prevented the court from making a distinction between value judgment and fair comment or factual statement. As the Court ruled,

*“...domestic law presumes that the protection of the honor, dignity and reputation of public person outweighs the possibility of openly criticizing him or her (para 62)*

On the basis of the above, the Court in generalizing the issue announced that domestic law and practice contained such elements which if applied could engender the decisions “incompatible with Article 10 of the Convention” (para 62)

#### 4.3.2. Assessment of the facts

The Court carefully examined the texts of the two impugned articles and found that the domestic courts erred in their judgments by assessing the articles by principles incompatible with Article 10 principles of the Convention. The Court made its assessment on the basis of the following principles:

### Freedom of public debate

Both articles concerned the professional activities of Mr. Petro Symonenko and Ms. Natalia Vitrenko. This is clear from merely reading the texts of the articles. Thus, domestic courts erred in finding that the articles damaged both their professional and private life. This finding significantly narrows the claim and provides more Article 10 protection to the journalist. The level of acceptable criticism is wider against politicians than private citizens, especially if the criticism concerns their professional activity. This leads to the issue of freedom of public debate. Information and ideas are given an especially high level of protection when they are related to political debate. Public speech thus is accorded a high degree of protection. It has been emphasized by the Court several times that freedom of expression constitutes one of the essential foundations of a democratic society, in particular freedom of political and public debate. The impugned articles were published on the eve of Presidential elections where both plaintiffs were the candidates for Presidency. In addition, the articles discussed a possible confidential arrangement made by President Kuchma with the above politicians for the election campaign for the purpose of misleading the public and the results of the elections. Therefore, the information about alleged arrangement by Presidential office undoubtedly held significant public interest. Consequently, the articles were aimed at initiating public debates on the matters of significant public interest. As mentioned already, in the *Oberschlick* case, the Court ruled that although a politician is entitled to have his reputation protected, even when he is not acting in his private capacity, the requirements of that protection have to be weighed against the interest of open discussion of political issues.

Consequently, the two factors of criticism directed to professional activities rather than private life and the existence of public interest were decisive factors for the Court in deciding the level of protection to be given to the impugned statements. In addition, the journalist argued successfully before the Court that he was following the aim of initiating open public debate rather than acting maliciously in order to defame or insult the plaintiffs.

### Protection of critical and offensive speech

Article 10 envisages the protection of every kind of expression and information, but the effect of Article 10 of the Convention is especially important for the protection of critical and non-conformist speech. The freedom of information and expression as guaranteed by Article 10 is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also “to those that offend, shock or disturb the state or any sector of the population”. This means that Article 10 has to be interpreted from a perspective of a high level of protection for freedom for expression, even if this information is harmful to the state or some groups, enterprises or organizations and public figure, such as politicians and even judges.

In the instant case, the Court accepted that the articles were written in strong and sarcastic language. The Court admitted that the plaintiffs could have been offended or even shocked. However, as mentioned before, a speech that may offend or shock also enjoys Article 10 protection. However, this finding must not be accepted narrowly but must be considered in the context of all other findings of the Court made in the context of the freedom of public debate and facts and value judgment.

### Facts and value judgment

The Court has repeatedly ruled that Article 10 of the Convention gives protection to ideas as well as to all kinds of information. It is not only opinions, philosophical ideas or political speech that are protected by Article 10, but also facts and news or even factual data. Under Principle 10 of Defining Defamation by Article 19<sup>7</sup>, an opinion is defined as a statement which either

- i. does not contain a factual connotation which could be proved to be false; or
- ii. cannot reasonably be interpreted as stating actual facts given all circumstances, including the language used (such as rhetoric, hyperbole, satire or jest)

In addition, as already indicated above, the Court will find it a violation of Convention when domestic courts require proof of the truthfulness of the expressed opinion or, in Convention term, the value judgment. In the *Thorgeirson* judgment (ECHR, 25 June 1992), the Court decided that in so far as the applicant was required to establish the truth of his statements, he was faced with an unreasonable if not impossible task.

The Court found it unacceptable that the local courts demanded the Applicant to prove the truthfulness of several opinions or value judgments expressed in the articles, such as the title of the second article (On the Sacred Cow...). Despite the fact that the domestic courts accepted that such statements were value opinions, which seems to be a positive move, they demanded the Applicant prove their truthfulness, which is an impossible task. As the Court ruled, the impugned statements were made in the form of “political rhetoric which is not amenable to proof” (para 66).

### Wider level of permissible criticism against politicians

According to the Court, politicians and other public figures must tolerate a wider level of criticisms than ordinary citizens. The Court has built a considerable amount of case-law stipulating this principle. In addition, the Court has repeatedly ruled that where the interference concerned the limitation of free speech or journalistic freedom, the limitations under Article 10(2) must be narrowly construed. This means that the state has to convincingly establish to Court of the necessity of such interference as an extreme measure. The ECHR case-law provides several reasons for providing narrower protection to politicians. The first is that a politician

*“...inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large and he must consequently display a greater degree of tolerance”.*<sup>8</sup>

The second is that the politician is in such position that he/she may counter attack to any criticism to his/her address with even harsher criticism. In comparison, the judges as the guarantor of justice do not have such possibility. The profession of the judge does not allow them to respond with harsher criticism to any criticism against them. The third reason is that, in most cases, politicians, when holding higher government positions, enjoy the dominant

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<sup>7</sup> Defining Defamation: Principles of Freedom of Expression and Protection of Reputation. Article 19. July 2000

<sup>8</sup> *Lingens v. Austria* (1986) 8 EHRR 407, par 42

role of the government in the society. In addition, in many states defamation laws provide greater protection for certain public official than for ordinary citizens. According to Article 19, examples of such benefits include assistance from the State in bringing a defamation action, higher standards of protection for the reputations of public officials and higher penalties for defendants held to have defamed them.

In the instant case the Court, in ruling that the impugned statements might truly defame or offend the plaintiffs, at the same time stated that “in choosing their profession, they laid themselves open to robust criticism and scrutiny; such is the burden which must be accepted by politicians in a democratic society” (para 67).

### *Margin of appreciation*

Finally, the Court found that even though the Ukrainian courts were following a legitimate purpose of protecting the reputation of politicians, it overstepped the discretionary powers granted by the Court to member states in assessing the necessity of interference. Under the Court’s jurisprudence, the term discretionary power is formulated to allow a “margin of appreciation”. The Court has ruled previously that in assessing the necessity of interference, the national courts enjoy certain discretionary powers or a margin of appreciation but that this power is not absolute but limited by the supervisory role of the Court. Further, where the facts of the case refer to defamation and libel cases against public figures and to the protection of journalistic freedom, the supervisory role of the Court, or as the Court has put it the “European supervision”, is wider, and consequently the margin of appreciation of the states is narrow. In such cases as public morality or territorial integrity, the states enjoy a wider margin of appreciation.

In the given case, the Court in considering all of the above, ruled that the Ukrainian courts overstepped the afforded margin of appreciation in assessing the necessity of interference and measures of limitation which resulted in the national bodies applying disproportionate measures to the legitimate aim sought. In particular, the Court found that domestic courts acted in breach of Article 10 in demanding the Applicant to 1) rectify the impugned statements and 2) to pay compensation for non-pecuniary (moral) damage.