



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

FIRST SECTION

**CASE OF REZNIK v. RUSSIA**

*(Application no. 4977/05)*

JUDGMENT

STRASBOURG

4 April 2013

**FINAL**

**09/09/2013**

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



**In the case of Reznik v. Russia,**

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

Isabelle Berro-Lefèvre, *President*,

Mirjana Lazarova Trajkovska,

Julia Laffranque,

Linos-Alexandre Sicilianos,

Erik Møse,

Ksenija Turković,

Dmitry Dedov, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 12 March 2013,

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

## PROCEDURE

1. The case originated in an application (no. 4977/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Genri Markovich Reznik (“the applicant”), on 5 February 2005.

2. The applicant was represented by Mr A. Makarov, a lawyer practising in Moscow. The Russian Government (“the Government”) were represented by Mr P. Laptev and Ms V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that his right to freedom of expression had been violated.

4. On 15 September 2006 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1938 and lives in Moscow. He is a lawyer and President of the Moscow City Bar.

### **A. Incident involving Mr Khodorkovskiy's counsel**

6. On 25 October 2003 Mr Khodorkovskiy, a co-owner of the Yukos company, was charged with criminal offences and placed in custody. On 27 October 2003 he was transferred to special-purpose remand centre IZ-99/1 in Moscow operating under the authority of the Ministry of Justice of the Russian Federation (hereinafter "the remand centre").

7. On 30 October 2003 a lawyer, Ms A., accepted to represent Mr Khodorkovskiy in the criminal proceedings.

8. On 11 November 2003 Ms A. visited her client in the remand centre. On leaving the centre, she was stopped by a prison inspector, Mr B., who accused her of carrying unauthorised material that Mr Khodorkovskiy had given her.

9. It appears from a personal inspection report (*протокол личного досмотра*) of the same date that Mr B. "examined the belongings and clothing of the lawyer, Ms A." and seized two documents: a printed document concerning the case against Mr Khodorkovskiy's co-defendant, and a torn handwritten note. The report was signed by Mr B., Ms A. and two prison officers who were present during the search. The parties agreed that one of them had been a man (Mr F.); the identity and sex of the second officer was in dispute: the Government claimed that it had been a woman, "L-va"; the applicant insisted that it had been a man, "L-vich".

10. The investigators claimed that the note had contained instructions about exercising influence on witnesses and interfering with the investigation. On 22 December 2003 the Ministry of Justice asked the Moscow City Bar to disbar Ms A. for acting in breach of the law and the lawyers' code of ethics. The applicant, as President of the Moscow City Bar, publicly criticised the request by the Ministry of Justice.

### **B. Television discussion on the incident**

11. On 25 December 2003 the NTV channel invited the applicant and Mr Buksman, the Director of the Moscow Department of the Ministry of Justice, to the talk show, "The Country and the World" («Страна и мир»), for a discussion of the incident involving Ms A. The debate was broadcast live at about 10 p.m.

12. In the first few minutes of the discussion the applicant asked Mr Buksman about his view on the events and the grounds for making the request for disbarment. Mr Buksman did not give specific answers, stating that the issue was not within his competence.

13. The presenter then asked the applicant about the relationship between the Moscow City Bar and the Ministry of Justice, implying that it was rather strained. The applicant denied that any tension existed and added:

“I have to say that we have now examined the matter of lawyer A. There was no attempt to pass any note from Mr Khodorkovskiy outside the remand centre. There were no grounds for carrying out a search (*обыск*) which, by the way, was performed by men who rummaged (*шарили*) about the body of the woman lawyer. Evidence obtained by criminal or unlawful means has no legal value. There is nothing, absolutely nothing, in Ms A.’s records that could warrant her disbarment.”

14. The presenter then gave the floor to Mr Buksman, who said that there existed a normal professional relationship between the Moscow City Bar and the Ministry of Justice. The show ended.

### C. Defamation proceedings

15. On 8 January 2004, remand prison IZ-99/1 and warders Mr B. and Mr F. lodged defamation claims against the applicant and the NTV television company with the Cheremushkinskiy District Court of Moscow. They claimed that the applicant had falsely stated that male officers had “rummaged” about Ms A.’s body and carried out a “search” on her, whereas they had merely “inspected” her documents. Since the domestic law made a distinction between a “search” (*обыск*) and an “inspection” (*допрос*), the applicant’s statement amounted to an allegation of a breach of the Russian law that was false and damaging both to the professional reputation of the remand prison and to the honour and dignity of its officers. They sought a rectification and compensation in respect of non-pecuniary damage.

16. In the defamation proceedings the District Court heard many witnesses and, in particular, the warders of the remand prison who had taken part in the incident involving counsel A. One of them, Mr L-vich, testified as follows:

“I received a phone call and I was invited to take part in the drafting of a report. When I arrived, Ms A., Mr B. and Mr F. were in the office. B. was drafting the report. A. snatched a piece of paper and began tearing it apart. We removed the document [from her], I signed the report and left.”

17. Ms A. described the way in which the documents had been removed from her:

“I was subjected to a humiliating procedure, as a woman and as a lawyer. They took the materials of the defence away from me by force. How is it possible to take the materials, without touching me, while I was holding onto them? ... Could there be any contact, other than bodily contact, if I was clutching the materials to my chest and the prison employees were tearing them away from me? It was not just my hands that they touched. [They touched] the clothing that was covering my body.”

18. In the meantime, on 3 February 2004 the Council of the Moscow City Bar formally rejected the Ministry’s request for Ms A.’s disbarment. It found, in particular, that the inspection (*допрос*) carried out on the person of Ms A. on 11 November 2003 and the seizure of her materials had been unlawful.

19. On 10 June 2004 the District Court gave judgment on the defamation claim, finding as follows:

“It was established at the court hearing that on 25 December 2003 a televised discussion between ... Mr Buksman and the lawyer Mr Reznik had been broadcast live on the NTV channel. The presenters did not edit the text of the interventions by Mr Buksman or Mr Reznik ... Mr Buksman was connected with the presenter via a direct link, the defendant Mr Reznik was present in the studio. It can be seen from a video recording which the court examined ... that Mr Buksman and the defendant made statements of a controversial nature. The participants put questions to each other and replied to questions from the presenters. ...

The court considers that the statements by the defendant [Mr Reznik] were simply an expression of his opinion on an event that had attracted public attention and was widely discussed at the time. During the show “The Country and the World” on 25 December 2003, a public official and a lawyer held a discussion in which they expressed different opinions on the same event. The statements by the defendant Mr Reznik were not offensive and did not damage the plaintiffs’ honour, dignity or professional reputation. The defendant, in his reply to the presenter’s question, did not mention either remand prison no. 1 or the plaintiffs F. and B. ...

The plaintiff – remand prison no. 1 – alleged a violation of the rights of individuals rather than those of prison no. 1. ... In the instant case, the statements by the defendant, Mr Reznik, did not contain allegations about the plaintiff, remand prison no. 1, nor did Mr Reznik’s statements damage its reputation. It follows that the claims by remand prison no. 1 are unlawful and unjustified because the plaintiff seeks the rectification of allegations concerning its employees.

The claims by the plaintiffs F. and B. are likewise unjustified because the statements by the defendant did not mention any names, still less the plaintiff’s names. Moreover, ... there was no mention of their place of work or place of residence, or of their appearance or characteristic features, their rank or their position; the discussion was not accompanied by any photographs or video footage of the plaintiffs; nor were their voices broadcast. It follows that the defendant’s statements did not contain any information damaging to the honour or dignity of Mr F. or Mr B.

[The court rejects as] unfounded the arguments by remand prison no. 1 to the effect that the discussion was preceded by footage showing a building with its postal address, which could have enabled television viewers to recognise Matrosskaya Tishina remand prison no. 1. Neither Mr Buksman nor Mr Reznik mentioned remand prison no. 1 in their replies. Moreover, it was the NTV channel that decided to broadcast the footage featuring the building with its address at the beginning of the show, but the plaintiffs have lodged no defamation claim against the channel ...

Having regard to the above-stated, the court finds that the claims are unjustified and must be rejected.”

20. The remand centre, Mr B., and Mr F., all lodged statements of appeal.

21. On 10 August 2004 the Moscow City Court quashed the District Court’s judgment and granted the defamation claims by all three plaintiffs, finding as follows:

“... the conclusion of the [district] court to the effect that the statements made by the defendant in a live television show did not damage the reputation [of the plaintiffs] is not correct. The statements did damage the honour and dignity of the prison officers F. and B. and the professional reputation of remand prison no. 1 because they actually contained an accusation that the male prison officers had searched the female lawyer in a degrading manner. ...

It can be seen from the statements by the witnesses Mr L-vich and Mr T., the personal inspection report, and the conclusions of the Qualifications Panel of the Moscow City Bar that the prison officers did not carry out a search on Ms A., contrary to what Mr Reznik alleged, but the [district] court did not take this fact into account ... The law distinguishes between the terms ‘inspection’ and ‘search’, and the defendant Mr Reznik, a professional lawyer, could not have been unaware of that distinction. Although he had at his disposal reliable information that the prison officers had carried out an inspection of Ms A.’s documents rather than searched her, he made untrue statements in a live television show ...

Further, the [city] court cannot agree with the [district] court’s conclusion that the defendant [Mr Reznik] did not identify any of the plaintiffs by name ... That conclusion contradicted the operative part of the judgment, in which the [district] court found that the incident ... had taken place on the premises of remand prison no. 1 and concerned the removal of a note from Ms A. ... The NTV channel showed the building at 18 Matrosskaya Tishina Street, and the defendant Mr Reznik later made the contested statements. In those circumstances, the professional reputation of remand prison no. 1 had been undermined and it had standing to seek judicial protection from defamation. The plaintiffs F. and B., who were employees of the remand prison and who had taken part in the inspection of [Ms A.’s] papers ... also had standing to sue in defamation.”

22. The City Court ordered the applicant to pay 20 Russian roubles (RUB) to each of Mr B. and Mr F. in respect of compensation for non-pecuniary damage. The NTV channel was ordered to broadcast a rectification.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Constitution of the Russian Federation

23. Article 29 guarantees freedom of thought and expression, together with freedom of the mass media.

### B. Civil Code

24. Article 152 provides that an individual may apply to a court with a request for the rectification of statements that are damaging to his or her honour, dignity or professional reputation if the person who disseminated such statements does not prove their truthfulness. The aggrieved person may

also claim compensation for losses and non-pecuniary damage sustained as a result of the dissemination of such statements.

### **C. Personal inspection and body search**

25. A personal inspection (*личный досмотр*) or an inspection of personal belongings may be carried out with a view to uncovering instruments or objects of an administrative offence (Article 27.7 § 1 of the Code of Administrative Offences). Personal inspections must be carried out by a person of the same sex, in the presence of two attesting witnesses (*понятые*) of the same sex (Article 27.7 § 3).

26. A suspect in a criminal case may be subjected to a body search (*личный обыск*) (Article 93 of the Code of Criminal Procedure). Body searches must be carried out by a person of the same sex, in the presence of attesting witnesses (*понятые*) or specialists of the same sex (Article 184 § 3).

27. The Pre-Trial Detention Act (Law no. 103-FZ of 15 July 1995) established that, if there were grounds to suspect visitors of passing prohibited objects, substances or food, prison officers were entitled to carry out an inspection of their clothes and belongings upon their entry or exit from the prison premises (part 6 of section 34).

## **THE LAW**

### **I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION**

28. The applicant complained about a disproportionate restriction on his right to freedom of expression guaranteed under 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 ...

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. Arguments by the parties**

### *1. The Government*

29. The Government advanced a number of reasons for considering the applicant's statement as a factual allegation rather than a value judgment. It was significant, in their view, that he had taken part in the talk show in his official capacity as the President of the Moscow Bar. The audience had viewed him as a well-informed person who was competent to assess alleged breaches of the rights of lawyers and to take appropriate action. Taking into account that "the Russian public traditionally regarded the authorities and their representatives with mistrust", the audience would have been more inclined to believe the words of a well-known lawyer than those of the acting head of a department of the Ministry of Justice. The applicant could not be held accountable for his statements to the standard of a journalist because he was seen as an official disseminating verifying information.

30. Turning to the content of the applicant's statement, the Government submitted that the opening sentence concerning an inquiry into Ms A.'s case had created the impression that the applicant had been about to report on the findings of the inquiry. Accordingly, the following sentences could only be interpreted as an outline of the findings, that is, the established facts and the characterisation given to them in law. They could not have been a mere personal opinion on the part of the applicant. The applicant had presented the situation of Ms A. as a specific example of a breach of law committed by the authorities.

31. The Government believed that the factual nature of the applicant's statement was not diminished on account of the fact that he had not identified the prison warders by name or mentioned the remand prison, because the talk show had been preceded by a story about remand prison IZ-99/1 of Moscow, in which the prison building and postal address had been shown. The names of the prison warders had been public knowledge because they had been previously mentioned in the other media. In the Government's submission, for the defamation claim to be granted, it was sufficient that at least one television viewer – including lawyers, prison employees, and parents and friends of the plaintiffs – could make a connection between the applicant's allegation of unlawful action on the part of prison warders on the one hand, and Mr F. and Mr B. on the other. The detailed description of the situation that the applicant had given had made their identification "simple and evident". Moreover, the way in which the applicant had described the incident and whether or not the word "rummaged" had been damaging for the plaintiffs' reputation were irrelevant. The plaintiffs had incurred damage on account of the applicant's allegation of a breach of the law, irrespective of the words in which he had couched it.

32. The Government maintained that the applicant's allegation that Ms A. had been searched by male warders was untrue. The report of 11 November 2003 had indicated that the inspection had been carried out by two men (F. and B.) and one woman (L-va), and that Ms A. had been subjected to an "inspection" rather than to a "search". An "inspection" could be carried out also by men if the prohibited items were surrendered voluntarily or if the inspection only concerned the belongings rather than the persona of the offender. The Government alleged that the applicant had craftily confused the terms "search" and "inspection", claiming that there had been no grounds to carry out a search. Indeed, there had been no grounds for a search and Ms A. had not been searched, but an inspection had been required on the basis of section 34 of the Pre-Trial Detention Act because Ms A. had been suspected of passing prohibited material from Mr Khodorkovskiy. That written material had been found and seized from her.

33. Finally, the Government emphasised that the applicant – an experienced lawyer who should know the difference between a "search" and an "inspection" – had made his allegation on a television channel that broadcasts not only to Russia but also to European countries. His statements had amounted to a negative assessment of Mr F.'s and Mr B.'s performance of their professional duties and had groundlessly tarnished the professional reputation of the remand prison. The interference had therefore been necessary to protect civil servants from unfounded verbal attacks (here they referred to *Lešník v. Slovakia*, no. 35640/97, § 53, ECHR 2003-IV).

## 2. *The applicant*

34. The applicant disagreed with the Government's submission that the impugned statement was to have been seen as a factual allegation rather than an expression of his subjective opinion. He pointed out, firstly, that it had been made in the context of an open debate between himself and a State official on a matter of intense public interest. The presenter had not introduced him in his official capacity as the President of the Moscow Bar and his part in the discussion had been that of a lawyer and human rights defender, and a long-standing member of the Moscow Helsinki Group.

35. In the applicant's view, the thrust of his criticism had not been directed at the remand prison or its warders, for he had used the impersonal word "men" in describing the incident. He could not be held responsible for the fact that the show had been preceded by some footage featuring the remand centre building: he had not made or approved any programming decision and he could not have known what kind of footage would be broadcast just before his intervention. Besides, the number of the remand centre had not been given and the footage only included a shot of the street sign, rendering the remand prison unidentifiable in the eyes of the wider television audience, who had no idea how many remand prisons there were

in Moscow and in which streets they were located. The applicant also added that at the time of the broadcast, the names of Mr B. and Mr F. had not once been mentioned in the press and had been unknown to the audience.

36. The applicant asserted that, contrary to the Government's submission, no female warder had taken part in Ms A.'s inspection or been present during that procedure. The personal inspection report had been signed by Major L-vich, a deputy assistant prison governor, and the same Major L-vich had been examined in the witness stand before the District Court. The participation of a female warder had not been mentioned by any employees of the remand prison or by any authority of the many that had carried out inquiries into the incident, including the prosecutor's office, the courts, the Ministry of Justice and the qualifications panel of the Moscow Bar.

37. The statement about men touching the female lawyer's body rested on a sufficient factual basis. Ms A. had confirmed before the District Court that the warders had snatched the materials from her while she was holding them against her chest. Mr B.'s report of 11 November 2003 had also mentioned that an inspection had been carried out of A.'s "belongings and clothing", and that she had resisted the removal of the materials. That could only be construed as an indication of close physical contact between the male warders and Ms A.

38. The applicant pointed out that there was a close proximity between the words "search" and "inspection" in everyday use. He had not been talking for the benefit of his learned colleagues, but rather to a television audience, employing language that was accessible and understandable for ordinary viewers. For lay people, the nuances of the legal meaning of the terms "search" and "inspection" were indistinguishable and could as well be used as synonyms. The applicant observed that even the Russian laws did not give a precise definition of those terms by which they could be distinguished. He also cited a number of publications in the printed media relating to the same incident that had used the words "search/searched", but which had not prompted a defamation claim on the part of the remand prison or its warders.

39. In sum, the applicant considered that he had presented his balanced subjective view on the incident involving Ms A., which had rested on the findings of an inquiry by the Moscow Bar. The inquiry had concluded that the inspection of Ms A. had been carried out in breach of the applicable laws. The inquiry had disproved the allegation that Ms A. had been carrying a note from Mr Khodorkovskiy, which allegation the prison employees had invoked as a ground for examining her belongings and clothing. Irrespective of whether the procedure was to be described as a "search" or an "inspection", in either case it was unlawful for male warders to examine a female lawyer. The applicant had thus related, comprehensively and in good faith, the facts as he knew them, without resorting to any exaggeration or

exceeding the acceptable limits of freedom of speech. The interference had not been necessary in a democratic society and the judgment of the Moscow City Court had had a “chilling effect” not just on the applicant but also on other legal professionals, averting them from contributing to debates on current issues of public interest.

### **B. Admissibility**

40. The Court considers 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.

### **C. Merits**

41. It is common ground between the parties that the City Court’s judgment in the defamation proceedings constituted an interference with the applicant’s right to freedom of expression guaranteed by Article 10 § 1. The interference had a lawful basis, notably Article 152 of the Civil Code, which allowed the aggrieved party to seek the judicial protection of his reputation and claim compensation in respect of non-pecuniary damages. It also pursued a legitimate aim, that of protecting the reputation or rights of others, within the meaning of Article 10 § 2.

42. What remains to be established is whether the interference was “necessary in a democratic society”. The test of necessity requires the Court to determine whether the interference corresponded to a “pressing social need”, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient (see, among many other authorities, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV). In assessing whether such a need exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. The Court’s task in exercising its supervisory function is not to take the place of the national authorities, but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their margin of appreciation. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *Dichand and Others v. Austria*, no. 29271/95, § 38, 26 February 2002, with further references).

43. The Court notes at the outset the particular context of the instant case. The statement which gave rise to the defamation action was made by the applicant during a live television debate in which he and an official from

the Moscow Department of the Ministry of Justice took part. The discussion revolved around the move by the Ministry of Justice to have Ms A., legal counsel for Mr Khodorkovskiy, disbarred. Mr Khodorkovskiy – formerly one of the wealthiest individuals in Russia and a controlling shareholder of a major oil company (see *Khodorkovskiy v. Russia*, no. 5829/04, § 7, 31 May 2011) – had at that time been imprisoned in a Moscow remand centre. The criminal proceedings against him and the strategy of his defence were matters of intense public and media attention. The request to have a member of his defence team disbarred must have sparked a further wave of public interest. However, there is nothing in the text of the Moscow City Court’s judgment to suggest that the City Court performed a balancing exercise between the need to protect the plaintiffs’ reputation and the Convention standard, which requires very strong reasons for justifying restrictions on debates on questions of public interest (see *Godlevskiy v. Russia*, no. 14888/03, § 41, 23 October 2008, and *Krasulya v. Russia*, no. 12365/03, § 38, 22 February 2007). The Court finds that the domestic court failed to recognise that the present case involved a conflict between the right to freedom of expression and the protection of the reputation (see *Dyundin v. Russia*, no. 37406/03, § 33, 14 October 2008).

44. The applicant is a professional lawyer and the President of the Moscow Bar. Admittedly, the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts, and such a position explains the usual restrictions on the conduct of members of the Bar. However, as the Court has repeatedly emphasised, lawyers are entitled to freedom of expression too and they have the right to comment in public on the administration of justice provided that their criticism does not overstep certain bounds (see *Kyprianou v. Cyprus* [GC], no. 73797/01, §§ 173-174, ECHR 2005-XIII; *Amihalachioaie v. Moldova*, no. 60115/00, § 27, ECHR 2004-III; and *Nikula v. Finland*, no. 31611/96, § 45, ECHR 2002-II, with further references). The Court does not find persuasive the Government’s argument that by reason of his legal background and position of authority, the applicant should have shown particular meticulousness in his choice of words. Firstly, he was speaking for the benefit of a lay audience of television viewers, rather than to a legal forum. The word “search” is common and acceptable in everyday language to describe adequately the essence of the procedure to which Ms A. was subjected. In those circumstances, the applicant could not be held accountable for his choice of words to the same standard of precision as could be expected of him when delivering a speech before a court of law or making written submissions to the same. Secondly, the format of the discussion between the applicant and a State official was designed to encourage an exchange of views or even an argument, in such a way that the opinions expressed would counterbalance each other and the debate would hold the viewers’ attention. The presenter fed questions to the participants,

some of which hinted at the existing tension in the relationship between the Ministry of Justice and the Moscow Bar. As the discussion was broadcast live, the applicant was unable to reformulate or refine his words before they were made public. Further, the other participant to the debate was a representative of the Ministry of Justice. As he was given the floor after the applicant (see paragraph 14 above), he could have dispelled any allegation which he considered to be untrue and presented his own version of the incident, which however he chose not to do (compare *Filatenko v. Russia*, no. 73219/01, § 41, 6 December 2007, and *Giündüz v. Turkey*, no. 35071/97, § 49, ECHR 2003–XI).

45. The Court further reiterates that, for an interference with the right to freedom of expression to be proportionate to the legitimate aim of the protection of the reputation of others, the existence of an objective link between the impugned statement and the person suing in defamation is a requisite element. Mere personal conjecture or subjective perception of a publication as defamatory does not suffice to establish that the person was directly affected by the publication. There must be something in the circumstances of a particular case to make the ordinary reader feel that the statement reflected directly on the individual claimant or that he was targeted by the criticism. Those principles also apply in the sphere of television and radio broadcasting (see *Godlevskiy*, cited above, § 44; *Filatenko*, cited above, § 45, and *Dyuldin and Kislov v. Russia*, no. 25968/02, § 44, 31 July 2007). It is an uncontested fact in the instant case that neither the individual plaintiffs – two prison warders – nor the suing legal entity – a Moscow remand centre – had been named in the applicant’s speech. The City Court accepted, nevertheless, that all of them were entitled to sue in defamation because the applicant’s intervention had been preceded by some footage showing the remand centre building. The Government also added that the prison warders had been identifiable because their names had been publicised by other media. Those reasons do not appear sufficient to the Court. The discussion was broadcast live and the applicant could not have been aware of any footage that the editor had chosen to use as an introduction to the debate. The Government’s contention that the names of Mr B. and Mr F. had entered the public domain was not substantiated with any material from the printed or visual media, whereas the applicant produced a selection of newspaper articles, all of which referred to them as “prison officers”, without giving their name or rank. In any event, the extent of the applicant’s liability in defamation must not go beyond his own words and he may not be held responsible for statements or allegations made by others, be it a television editor or journalists. The fact remains that there was nothing in the applicant’s statement to permit identification of the plaintiffs whom he described impersonally as “men”, without mentioning their names or employer. In those circumstances, the Court considers that the domestic authorities failed to adduce sufficient

reasons for establishing an objective link between the statement in question and the individual claimants in the defamation action.

46. Turning to the content of the applicant's statement, the Court considers that it need not rule on the parties' controversy over whether it was a value judgment or a factual allegation. The Court has constantly held that even a value judgment without any factual basis to support it may be excessive and that the relevant test is whether a sufficiently accurate and reliable factual basis proportionate to the nature and degree of the allegation can be established (see *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 78, ECHR 2004-XI; *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II, and *De Haes and Gijssels v. Belgium*, 24 February 1997, § 47, *Reports of Judgments and Decisions* 1997-I). The applicant said that counsel A. had not attempted to take out any material from her client and that there had accordingly been no reason to subject her to a search. He added that the search had been carried out by men who had "rummaged" about her body. The Moscow City Court in its judgment, and subsequently the Government in their submissions to the Court, did not take issue with the word "rummaged" used by the applicant, but insisted that the statement was defamatory because it implied a breach of law committed by the prison warders.

47. The Court has already examined the incident involving Ms A. in the application lodged by her client, Mr Khodorkovskiy. It established, in particular, that no obvious provision of Russian law prohibited counsel from keeping notes during meetings with a client and that section 34 of the Pre-trial Detention Act concerning inspection of visitors carrying prohibited objects (cited in paragraph 27 above) did not seem to be applicable in the context of meetings between the defendant and counsel. Against that background, the Court found that Ms A.'s note "[had been] to all intents and purposes privileged material, that the authorities had [had] no reasonable cause to believe that the lawyer-client privilege was being abused, and that the note [had been] obtained from Ms A. deliberately and in an arbitrary fashion" (see *Khodorkovskiy*, cited above, §§ 199-201). Similar findings were contained in the Moscow Bar Council's decision rejecting a request by the Ministry of Justice for the disbarment of Ms A. (see paragraph 18 above). Those findings constituted a sufficient factual basis for the applicant's statement that the inspection of Ms A. had been devoid of legal grounds.

48. As to the treatment which, according to the applicant, had been inflicted on Ms A. by prison warders, the Government drew a distinction between a "search" and an "inspection", claiming that the latter – by contrast with the former – could also be carried out by men and, in addition, that a female warder had taken part in the inspection. The Court notes at the outset that the presence of a woman appears to be a conjecture resulting from a signature on the inspection report which could be read as either a

male (“L-vich”) or a female (“L-va”) last name. In fact, no woman by the name of L-va or any other name was ever mentioned in the domestic proceedings, whereas the male warder L-vich was called to testify and appeared before the District Court. Mr L-vich confirmed in the witness stand that he had been in the office where Ms A. and warders B. and F. had been present, that he had removed a document from Ms A. and that he had signed the inspection report (see paragraph 16 above).

49. The Court does not consider it decisive that the applicant described the procedure as a “search” rather than as an “inspection”. Firstly, as it has observed above, subtle nuances of legal terminology would not be significant for a lay audience of television viewers. Secondly, the thrust of the applicant’s invective was directed at the male warders who had taken it upon themselves to examine the female counsel’s clothing. This constituted a departure from the requirements of the domestic law, which explicitly provided that both a personal inspection and a body search should be carried out by persons of the same sex and in the presence of two attesting witnesses (see paragraphs 25 and 26 above). Lastly, the Court observes that the personal inspection report indicated that the warders had examined not just the belongings but also the clothing of Ms A. She stated in the defamation proceedings that they had removed from her the printed media that she had been clutching to her chest (see paragraph 17 above). Even though the word “rummage” appears somewhat exaggerated, the Court does not consider that the applicant went beyond the limits of acceptable criticism, as he was seeking a way to convey his indignation at the actions by the male warders. In the light of the above, the Court finds that the applicant’s statements rested on a sufficient factual basis and that the Moscow City Court did not base its decision on an acceptable assessment of the relevant facts.

50. As regards the sanction imposed on the applicant, the Court recalls the “chilling effect” that the fear of sanction has on the exercise of freedom of expression (see, among many others, *Nikula*, cited above, § 54, and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 114, ECHR 2004–XI). This effect, which works to the detriment of society as a whole, is likewise a factor which concerns the proportionality of, and thus the justification for, the sanctions imposed on the applicant, who, as the Court has held above, was entitled to bring the matter at issue to the public’s attention. Although the penalty of 20 Russian roubles was negligible in pecuniary terms, the institution of defamation proceedings against the President of the Moscow City Bar in the context of the present case was capable of having a chilling effect on his freedom of expression. In any event, the sanction was not justified in the light of the factors set out above (compare *Axel Springer AG v. Germany* [GC], no. 39954/08, § 109, 7 February 2012).

51. In sum, the Court has found that the applicant was entitled to state his opinion in a public forum on a matter of public interest and that his statements had a factual foundation. On the other hand, the Moscow City Court did not recognise that the proceedings in the present case involved a conflict between the right to freedom of expression and the protection of reputation. Those failings call for the conclusion that the standards according to which the national authorities examined the defamation claims against the applicant were not in conformity with the principles embodied in Article 10.

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

## II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

53. Lastly, the applicant complained under Article 6 of the Convention of a breach of his right to a fair hearing in the proceedings before the Moscow City Court and the absence of an effective remedy required under Article 13 of the Convention.

54. In the light of all the material in its possession and in so far as the matters complained of are within its competence and distinct from the issues examined above, the Court finds that those complaints do not disclose any appearance of violations of the rights and fundamental freedoms set out in the Convention and its Protocols.

55. It follows that this part of the application must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. Article 41 of the Convention provides:

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

### A. Damage

57. The applicant did not submit a claim in respect of pecuniary or non-pecuniary damage. Accordingly, there is no call to make an award under this head.

## **B. Costs and expenses**

58. The applicant claimed 4,903.84 euros (EUR) for the translation costs and EUR 270.88 for the postal expenses incurred in the proceedings before the Court. He produced translation contracts and postal receipts.

59. The Government submitted that certain translation costs related to the documents which were irrelevant to the domestic proceedings and that the translation of domestic judgments and decisions had not been necessary because it had not been requested by the Court.

60. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court accepts the Government's submission that a portion of the translation expenses concerned the documents relating to Mr Khodorkovskiy's – rather than the applicant's – case and was not therefore necessarily incurred. Regard being had to the materials in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 4,000 for costs and expenses in the proceedings before the Court, plus any tax that may be chargeable on the applicant.

## **C. Default interest**

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

## **FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. *Declares* the complaint concerning the applicant's right to freedom of expression admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds*
  - (a) that the respondent State is to pay the applicant, 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 on the applicant, in respect of costs and expenses, to be converted into Russian roubles 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;

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

Done in English, and notified in writing on 4 April 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen  
Registrar

Isabelle Berro-Lefèvre  
President