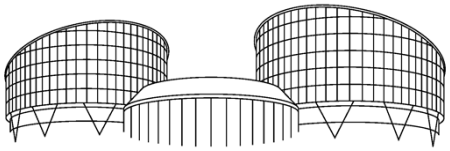

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF TIMAKOV AND OOO ID RUBEZH v. RUSSIA

(Applications nos. 46232/10 and 74770/10)

JUDGMENT

Art 34 • Locus standi • Shareholders admitted to pursue proceedings instead of dissolved applicant company Art 10 • Freedom of expression • Failure to apply relevant Convention standards • Civil defamation awards largely beyond applicant's financial resources, leading to seizure of household items • Relevant yet insufficient grounds given • Disproportionate interference Art 6 § 1 (civil) • Public hearing • Civil defamation case heard in camera without reason

STRASBOURG

8 September 2020

FINAL

08/12/2020

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

In the case of Timakov and OOO ID Rubezh v. Russia,

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

Paul Lemmens, *President,*
Helen Keller,
Dmitry Dedov,
Alena Poláčková,
Gilberto Felici,
Lorraine Schembri Orland,
Ana Maria Guerra Martins, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

two applications (nos. 46232/10 and 74770/10) 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 Vladimir Viktorovich Timakov ("the applicant"), and a legal entity under Russian law, OOO ID Rubezh ("the applicant company"), on 3 August and 18 September 2010 respectively;

the decision to give notice of the complaints concerning the right to freedom of expression and the right to a public hearing to the Russian Government ("the Government") and to declare inadmissible the remainder of the applications;

the parties' observations;

the decision to uphold the Government's objection to examination of the application by a Committee;

Having deliberated in private on 30 June 2020,

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

INTRODUCTION

1. The case concerns two independent sets of civil proceedings for defamation brought by the then Governor of the Tula Region following the publication of an article in a local newspaper and of statements quoted by other news outlets expressing the view that the Governor had deserved the highest mark for corruption. The applicant, a journalist and a member of the regional legislature, was a defendant in each set of proceedings; the applicant company, the publisher of the newspaper, was involved in one of them. The first-instance court held the first set of defamation proceedings in camera, at the Governor's request. The domestic courts made sizeable awards in respect of non-pecuniary damage, referring in their reasoning to the Governor's social standing. In addition, criminal proceedings for libel were brought against the applicant in connection with the statements that had been found defamatory in the second set of civil proceedings.

THE FACTS

2. The applicant – a journalist and a member of the Tula Regional Duma (the regional legislature) at the material time – was born in 1965 and lives in Tula. The applicant company, an editorial and publishing house based in Tula, was a limited liability company. Its only shareholders were the applicant (with 49% of the shares) and Mr Vladimir Borisovich Leonov (with 51% of the shares). The applicant company edited and published a local newspaper, *Za Sechnyy Rubezh* ("the newspaper"). The applicants were represented by Ms G. Arapova, a lawyer practising in Voronezh.

3. The Government were represented by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. APPLICATION No. 46232/10

A. Impugned article

5. On 12 May 2009 the newspaper ran an editorial article entitled "What mark would the Governor deserve for corruption?" ("the article"), that had been written by the applicant. The thrust of the article was that Mr D., the then Governor of the Tula Region, had been involved in and condoned corrupt practices. The article contained several rhetorical questions and statements expressing its author's disapproval of what he perceived as the heightened levels of corruption in the Tula Region, for example:

> (i) "However, only a blind person would not notice the remarkable achievements of the acting Administration [of the Tula Region] in fostering corruption";
>
> (ii) "It is hardly believable that the today's saturnalia of corruption [in the Tula Region] could have taken place if it were headed by a person as transparent as a crystal";
>
> (iii) "How did it happen that journalists who a few years ago followed every misstep by the authorities now only speak of the Governor as a dead man, in accordance with the 'either good or nothing' maxim? Why the thick veil of silence has fallen onto media outlets of Tula? What does the Governor pay them in for loyalty – in envelopes filled with foreign currency, in baked goods with cabbage, or in sunlit smiles?"

B. Civil proceedings for defamation

6. On 5 June 2009 Mr D. brought civil proceedings for defamation against the applicants before the Privokzalnyy District Court of Tula ("the District Court"), requesting a retraction of fourteen of the statements that had appeared in the article and claiming 10,000,000 Russian roubles (RUB) in compensation for non-pecuniary damage.

7. On 13 July 2009 the District Court decided, at Mr D.'s request, to hear the case in camera in order to protect the claimant's reputation, reasoning that the public discussion of certain secret aspects pertaining to his private life and business reputation that might be uncovered in the course of the court hearings would be detrimental to "the correct examination of the claim".

8. The applicant argued before the District Court that the article had dealt with a matter of public interest and had invited readers to reflect on the situation described; it had not contained statements of fact (*сведения*).

9. On 25 August 2009 the District Court allowed Mr D.'s claim in part. It referred, in particular, to the Governor's status as a high-ranking public official, ordered a retraction of the fourteen impugned statements, and held the applicant and the applicant company jointly and severally liable to pay Mr D. RUB 1,000,000 (22,150[1] euros (EUR)) in respect of non-pecuniary damage. It also ruled that the applicants were to pay RUB 1,000 (EUR 22) in court fees. The District Court did not analyse whether any of the impugned statements, including those that had taken the form of rhetorical questions, had amounted to a value judgment. Instead it labelled them statements of fact and, to demonstrate their untruthfulness, listed (over five pages) various (i) legal measures adopted in the Tula Region aimed at combatting corruption and (ii) social programmes targeting those in need. The District Court found that the defendants had not submitted any evidence that the impugned statements were true. It summarily refused to consider the material (which included bookkeeping records, contracts, orders issued by the Governor, and newspaper articles) submitted by the defendants as evidence that there had been a sufficient factual basis to the impugned statements, for the sole reason that "the content of these documents did not allow the court to establish the facts proving the truthfulness of the tarnishing statements". It dismissed the defendants' argument that they had not been allowed to submit evidence because it had been seen as "an attempt to protract the examination of the case on the merits". The District Court reasoned, in particular, as follows:

> "Accordingly, the court finds that the statements disseminated in the article have not been supported by objective information and are *de facto* untruthful, defamatory, and tarnish the honour and dignity of Mr D., discredit him as the Governor of the Tula Region in the eyes of the public and tarnish his business reputation as the highest official of the Tula Region and the head of the permanently functioning highest executive authority of the Tula Region, its Administration, which has as one of its statutory powers ... the undertaking of measures to implement, ensure, and protect the rights and freedoms of a person and a citizen, protecting property and public order, counteracting terrorism and extremism, [and] combating crime.

[1] Hereinafter the amounts in Russian roubles are converted into euros at the exchange rate applicable on the date of the relevant decision or event.

> Moreover, the functioning of the [Tula] Region [and] its interactions with other constituent entities of the Russian Federation directly depends on, in particular, the business reputation and [moral] authority *(авторитет)* of its governor."

10. The applicants appealed. Mr Timakov argued, in particular, that, as a member of the Tula Regional Duma and thus a politician, he had expressed in the article his opinion on corruption and his subjective appraisal of Mr D.'s professional activities and performance of his official duties – that is to say he had made a value judgment. He pointed out that the District Court had refused to order a language expert to undertake an examination of the impugned article in order to distinguish value judgments from statements of fact, and had failed to apply Resolution No. 3 of the Plenary Supreme Court of Russia. He also complained of the excessive level of the award made to the claimant. The applicant company submitted that the impugned statements had merely constituted value judgments on the part of Mr Timakov.

11. On 4 February 2010 the Tula Regional Court ("the Regional Court") heard the applicants' appeal in a public hearing. It upheld the first-instance judgment for the reason that the impugned statements had "been presented in an affirmative form" and that they had "overstepped the limits of permissible and acceptable criticism in respect of a political and public figure". As regards RUB 1,000,000 awarded to Mr D., the Regional Court noted that "the relevant findings of [the District Court] [had been] justified in detail in the [first-instance] judgment; the [Regional Court] [saw] no reasons for their reassessment, and thus the argument of [the applicants] regarding the excessive amount of the award to the claimant in respect of non-pecuniary damage [was] ill-founded". It changed the modalities of payment of the award, ordering that the applicant and the applicant company each pay the claimant RUB 500,000 (EUR 12,000) in damages (rather than their being held "jointly and severally liable" – see paragraph 9 above). It also diminished the amount to be paid in court fees, ordering each applicant to pay RUB 100 (EUR 2.40).

12. Two requests lodged by the applicants for supervisory review were unsuccessful.

C. Enforcement proceedings and the applicant company's dissolution

13. On 4 March 2010 the bailiffs' service of the Tula Region ("the bailiffs' service") commenced enforcement proceedings.

14. According to the Government's observations regarding the admissibility and merits of the application of 23 May 2018, the judgment of 25 August 2009 (upheld on appeal on 4 February 2010) remained unenforced in its entirety, and the enforcement proceedings were terminated on account of the impossibility of their being executed. According to their

comments dated 17 September 2018 on the applicants' claim for just satisfaction, between July and September 2010 the bailiffs' service recovered a total of RUB 37,120 from Mr Timakov from the execution of the judgment of 25 August 2009 (which had been upheld on appeal on 4 February 2010).

15. According to the applicant, the bailiffs' service set up monthly withdrawals from his bank account in order for the RUB 500,100 awarded by the judgment of 25 August 2009 to be recovered. The documents contained in the case-file material available to the Court indicate that a total of RUB 37,120 (in three instalments) was withdrawn in favour of Mr D. by way of execution of the judgment of 25 August 2009.

16. In view of the sizeable award to be paid by the applicant company, and given its lack of funds, its only shareholders (the applicant and Mr Leonov) decided to dissolve the applicant company. On 24 March 2014 the applicant company was deleted from the Register of Legal Entities and ceased to exist.

17. By a letter of 9 July 2018 the applicant and Mr Leonov informed the Court of their intention to continue the proceedings initiated before the Court by the applicant company.

II. APPLICATION No. 74770/10

A. The applicant's statement concerning Mr D.

18. On 29 April 2009 the applicant received a phone call from Ms P., a journalist, who asked him for his opinion, as a member of the Tula Regional Duma, of the Governor and of corruption in the Tula Region. The applicant considered the conversation to be private, as Ms P. had not warned him that it would be recorded. During the conversation the applicant said that Mr D. deserved a "five" (the highest mark in the Russian education system) for corruption.

19. On the same date Ms P. posted on a local news website, *Tulskiye Novosti*, a short item quoting the applicant as follows:

> "[Mr] D. is a good public official – he deserves a mark of "four" [out of five]. Yet he deserves a "five" [out of five] as a corrupt official (*коррупционер*). During his first two years in office I thought that appointing a governor was much better than electing one. But later, when [Mr] D. had gained a foothold in the office, [and] had built a network of connections ... the situation changed. And what we have today is levels of corruption ... not seen even in the era of [the previous holder of the office of governor]."

20. According to the applicant, he remained unaware of the fact that his words had been reproduced on the website, as Ms P. had not informed him that they were about to be published and had not offered him the chance to review the text prior to its publication.

21. The applicant's words concerning the highest mark in corruption were reproduced in an article, which was entitled "A layabout or a workaholic?" and published in the 6-13 May 2009 issue of the Tula regional edition of the *Moskovskiy Komsomolets* newspaper.

B. Civil proceedings for defamation

22. On 12 May 2009 Mr D. brought civil defamation proceedings against the applicant, the *Tulskiye Novosti* news website, and the editorial board of the regional edition of *Moskovskiy Komsomolets,* seeking RUB 10,000,000 in compensation for non-pecuniary damage.

23. The applicant argued before the District Court that he had not been given an opportunity to review the interview prior to its publication. He also unsuccessfully sought the postponement of a court hearing owing to his engagements as a member of the Tula Regional Duma.

24. On 22 September 2009 the District Court held a hearing in the applicant's absence. It held the impugned statement to be a statement of fact that was unsupported by evidence, granted Mr D.'s claim in part, ordered a retraction to be published in the local edition of *Moskovskiy Komsomolets,* and awarded Mr D. RUB 1,000,000 (EUR 25,000) in compensation for non-pecuniary damage, to be paid by the applicant. The District Court reasoned, in particular, as follows:

> "Thus the court has reached the conclusion that the statements disseminated on the [news website] have not been supported by objective information and are *de facto* untruthful, defamatory, and tarnish the honour and dignity of Mr D., amount *de facto* to accusing Mr D. of involvement in crimes and other unlawful acts, discredit him as the Governor of the Tula Region in the public's view and tarnish his business reputation as the highest official of the Tula Region and the head of the permanently functioning highest executive authority of the Tula Region (its Administration), which has as one of its statutory powers ... the undertaking of measures to implement, ensure, and protect the rights and freedoms of a person and a citizen, to protect property and public order, to counteract terrorism and extremism, [and] to combat crime.
>
> Moreover, the functioning of the [Tula] Region [and] its interactions with other constituent entities of the Russian Federation directly depends on, in particular, the business reputation and [moral] authority *(авторитет)* of its Governor."

25. The applicant only received a copy of the judgment of 22 September 2009 on 22 December 2009. He lodged a statement of appeal, asking for it to be accepted outside the relevant statutory time-limit.

26. On 18 March 2010 the Regional Court upheld on appeal the District Court's judgment in its entirety, apart from modifying the amount awarded under the head of court fees.

27. Requests lodged by the applicant for supervisory review were unsuccessful.

C. Enforcement proceedings

28. On 14 December 2009 the bailiffs' service instituted enforcement proceedings.

29. On 20 May 2010, owing to the applicant's lack of sufficient funds to pay the award in full, the bailiffs' service decided to levy execution on the applicant's household items, including a cupboard, a sofa, a television set, a coffee machine, and a microwave oven, as well as the piano used by the applicant's minor daughter.

30. On 21 May 2010 the bailiffs' service decided – on the grounds that the applicant had not paid Mr D. RUB 1,000,000 voluntarily and for no good reason – to impose on the applicant a 7% enforcement fee. The decision stipulates that the sum of RUB 70,000 was to be recovered from Mr Timakov. However, the applicants and the Government in their observations before the Court submitted that the amount recovered as an enforcement fee was RUB 7,000.

31. The bailiffs' service set up monthly withdrawals from the applicant's bank account, in execution of the judgment of 22 September 2009. The documents contained in the case-file material available to the Court confirm that RUB 61,708.55 was withdrawn in favour of Mr D. and RUB 200 was withdrawn to cover the court fees.

32. On 8 December 2010 the bailiffs' service seized from the applicant's flat some of the items listed in the decision of 20 May 2010, as well as a set of brandy glasses and a decanter, a frying machine, and a stationary exercise bike. The price of the items seized was estimated at RUB 14,900.

33. The total amount recovered from the applicant through the enforcement of the judgment of 22 September 2009 was RUB 76,808.55.

D. Criminal proceedings for libel

34. In parallel with bringing his civil defamation proceedings, on 13 May 2009 Mr D. lodged a request for the institution of criminal proceedings for libel against the applicant in connection with the article entitled "A layabout or a workaholic?" (see paragraph 21 above).

35. The local branch of the Investigative Committee of the Prosecutor General's Office ("the investigative authority") carried out a pre-investigation inquiry, in the course of which the applicant explained that, as a member of the Tula Regional Duma, he had frequently denounced instances of corruption in the region and that he had criticised a corruption-conducive climate for which, in his opinion, Mr D. had been responsible.

36. On 15 June 2009 the investigative authority declined to open a criminal investigation against the applicant on account of the absence of the occurrence of a crime. That decision was later set aside by a hierarchical

superior. The investigative authority subsequently refused two requests lodged by Mr D. for the opening of a criminal investigation. The hierarchical superior quashed each of them, instead demanding an additional inquiry. On 20 August 2009 following an additional inquiry the investigative authority refused for the fourth time to initiate criminal proceedings.

37. On 22 January 2010 Mr D. reported the crime of libel to the local police.

38. On 1 February 2010 an investigator of the Town Department of the Interior of Tula opened criminal proceedings under Article 129 § 2 of the Russian Criminal Code ("Libel"), as in force at the material time. Possible sanctions were as follows: a fine of up to RUB 125,000 or in the amount of a convict's salary for the period of up to a year; 180 to 240 hours of forced labour; twelve to twenty-four months of community service; or three to six months' detention (*арест*).

39. On 21 June 2010 the applicant was indicted.

40. On 24 June 2010 a measure of restraint in the form of an obligation not to leave his place of residence was imposed on the applicant. He challenged it, unsuccessfully.

41. On 29 November 2010 the justice of the peace of the 57th court circuit of the Zarechenskiy District of Tula found the applicant guilty of libel disseminated in the media (Article 129 § 2 of the Criminal Code, as in force at the material time). However, the justice of the peace relieved the applicant of his punishment (*освобождение от наказания*) in view of the fact that "his deeds were no longer dangerous to society".

42. On 30 June 2011 a public prosecutor decided to drop all charges against the applicant and lodged an application for the criminal proceedings against him to be terminated. On the same date the Zarechenskiy District Court of Tula quashed the conviction of 29 November 2010 and terminated the criminal proceedings against the applicant for lack of the constituent elements of a crime. The ruling was upheld on appeal and became final on 31 August 2011.

III. SUBSEQUENT EVENTS

43. In February 2011 Mr D. was questioned by the investigative authority with regard to a criminal investigation into bribery.

44. In July 2011 Mr D. was dismissed from the office of Governor of the Tula Region. In September 2011 he was officially charged with passive bribery and placed under house arrest.

45. On 22 July 2013 Mr D. was found guilty of accepting bribes and sentenced to nine years and six months' imprisonment and given a fine of RUB 900,000. The first-instance conviction was upheld on appeal and became final.

46. On 10 December 2013 the applicant lodged a request for the reopening, on account of newly discovered circumstances, of the civil proceedings that had ended with the judgment of 25 August 2009, as upheld on 4 February 2010 (see paragraph 11 above). He argued that his value judgments – declared untruthful by the District Court – had in fact been confirmed by Mr D.'s conviction for bribery. On 3 February 2014 the District Court dismissed the request, which, in its view, concerned the reassessment of evidence. The ruling was upheld on appeal on 5 June 2014.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

47. For the relevant domestic framework and practice concerning civil defamation proceedings see *Cheltsova v. Russia* (no. 44294/06, §§ 32-34, 13 June 2017).

48. Article 10 §§ 1 and 2 of the Code of Civil Procedure 2002 provides that hearings in all civil courts must be public. A civil case may be heard in camera if it concerns State secrets or the confidentiality of adoption arrangements, or belongs to another category of cases defined by federal law. A hearing could be held in camera upon a request being lodged by a party to the proceedings in question seeking to protect a secret (commercial or otherwise) or her or his privacy, or to prevent the public discussion of certain circumstances where such discussion could cause damage to her or his legitimate interests.

THE LAW

I. JOINDER OF THE APPLICATIONS

49. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. CONSIDERATIONS *LOCUS STANDI*

50. In the absence of any objection by the Government concerning admissibility *ratione personae* in respect of the applicant company in application no. 46232/10, the Court notes *proprio motu* that the applicant company was dissolved after the application had been lodged. In view of the fact that its only shareholders (Mr Timakov and Mr Leonov) together expressed their interest in continuing the proceedings before the Court in the applicant company's stead (see paragraph 17 above), there is virtually no risk of any differences of opinion arising among shareholders or between shareholders and the applicant company's board of directors as to whether an infringement of Convention rights actually occurred or to the most appropriate way of reacting to such an infringement (compare

S.C. Fiercolect Impex S.R.L. v. Romania, no. 26429/07, § 39, 13 December 2016, and *Euromak Metal Doo v. the former Yugoslav Republic of Macedonia*, no. 68039/14, §§ 32-33, 14 June 2018). Accordingly, the Court accepts that the applicant company's shareholders have a legitimate interest in pursuing application no. 46232/10 in the stead of the applicant company dissolved while the application in question was pending before it, and that, accordingly, Mr Timakov and Mr Leonov have the requisite *locus standi* under Article 34 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

51. The applicants complained that the domestic courts' judgments in the two sets of defamation proceedings brought by Mr D. had unduly restricted their right to freedom of expression, as guaranteed by Article 10 of the Convention, which reads, in so far as relevant, 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. ...
>
> 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. Submissions by the parties

1. The Government

52. The Government contested the applicants' arguments. Accepting that there had been an interference with the applicants' right to freedom of expression, they argued that it had been prescribed by law, had pursued the legitimate aim of protecting Mr D.'s reputation and had been "necessary in a democratic society".

53. The applicants had disseminated untruthful statements concerning Mr D.'s corrupt practices, which had tarnished the reputation of the then Governor, who by virtue of his office should have been protected from offensive and abusive verbal attacks. The statements had not been based on verified facts or evidence and could have caused damage to the whole of the Tula Region as its prosperity had depended on the Governor's public image. The defendants had not proved before the domestic courts the veracity of the statements, which had therefore lacked a sufficient factual basis. In asserting that Mr D. had abused the office of Governor they had overstepped the limits of permissible criticism, acting contrary to the ethics of journalism.

54. When deciding on the amounts to be awarded to Mr D., the District Court had considered the nature and content of the impugned statements, the extent of their dissemination, the fact that they had depicted the Governor of the Tula Region as a person acting against the interests of society, and the negative effect they had had on the claimant's state of health (on which his ability to exercise his powers had depended). In view of the degree of suffering sustained by Mr D., the amounts awarded had been "necessary in a democratic society". By way of putting the amounts awarded to Mr D. into perspective, the Government referred to five domestic judgments in defamation proceedings where claimants had been awarded RUB 1,000,000. They also referred to three judgments of the Court that had found no violations of Article 10 of the Convention, despite sizeable domestic awards having been made in the relevant defamation cases.

55. As regards the criminal proceedings against the applicant in respect of libel, the Government submitted that criminal punishment constituted a measure of State coercion and that "criminal liability does not exclude civil [liability]", emphasising that everyone had the right to reputation. The criminal proceedings against the applicant had been terminated. Holding him civilly liable for defamation had been well-founded. The Government concluded that there had been no violation of Article 10 of the Convention.

2. The applicants

56. The applicants argued that the judgments in the civil defamation proceedings had amounted to an interference with their respective right to freedom of expression that had not been "necessary in a democratic society". They emphasised, in particular, that the domestic courts had accorded a heightened level of protection to the claimant's reputation on account of his position as the Governor of the Tula Region, in breach of the firmly established Convention standard that public officials and professional politicians, who inevitably and knowingly lay themselves open to the close scrutiny of their words and deeds by journalists and the public at large, had to display a greater degree of tolerance in respect of criticism. The domestic courts had not taken into account the essential role of the press in a democratic society or Mr Timakov's position as a member of the regional legislature who had been commenting on a matter of public interest.

57. The amounts awarded to Mr D. had been patently disproportionate as they had been larger than the fine imposed on Mr D. in the criminal proceedings for bribery. The applicants had experienced the chilling effect of the disproportionately large awards: the applicant company had been dissolved because it had not had sufficient funds to execute the judgment in Mr D.'s favour, and Mr Timakov, a provider for three minor children, had faced serious financial difficulties as a result of the enforcement proceedings. Referring to the case of *OAO Neftyanaya Kompaniya Yukos v. Russia* ((just satisfaction), no. 14902/04, 31 July 2014), the applicants

insisted that the dissolution of a legal entity should not absolve a responding State from its responsibilities under the Convention.

58. Mr Timakov furthermore argued that the very opening of the criminal proceedings for libel in respect of the facts that had already been considered in the civil proceedings had amounted to a disproportionate interference with his right to freedom of expression as a journalist and as a member of the regional legislature. Moreover, in the course of the criminal proceedings he had been obliged not to leave his place of residence, which had adversely affected his professional activities. The criminal trial and his conviction had caused him profound suffering and had damaged his reputation, even though the charges against him had eventually been dropped.

B. The Court's assessment

1. Admissibility

59. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. Merits

(a) Three instances of an alleged interference with the right to freedom of expression

60. The Court observes at the outset that the present case concerns three distinct sets of domestic proceedings initiated by Mr D. in response to news items written by a professional journalist hinting at corruption in the office of the Governor of the Tula Region: (a) the civil defamation proceedings involving both applicants that resulted in the judgment of 25 August 2009, which was upheld on 4 February 2010 (see paragraphs 9 and 11 above); (b) the civil defamation proceedings involving Mr Timakov that resulted in the judgment of 22 September 2009, which was upheld on 18 March 2010 (see paragraphs 24 and 26 above); and (c) the criminal proceedings for libel against Mr Timakov (see paragraphs 34-42 above).

61. The Court notes that it dismissed on a number of occasions objections by a respondent Government as to the lack of victim status in cases where the criminal proceedings instituted in connection with an applicant's exercising her or his right to freedom of expression had not resulted in a conviction (see, for example, *Altuğ Taner Akçam v. Turkey*, no. 27520/07, §§ 83, 25 October 2011; *Fatih Taş v. Turkey (no. 4)*, no. 51511/08, § 33, 24 April 2018; and *Ali Gürbüz v. Turkey*, nos. 52497/08 and 6 others, §§ 57-69, 12 March 2019). However, the Russian Government have made no similar objection as regards the criminal proceedings for libel against Mr Timakov. Accordingly, in the absence of any dispute between

the parties regarding the existence of an interference and/or Mr Timakov's victim status as regards the part of his complaint pertaining to the criminal proceedings for libel, the Court is satisfied that each of the three sets of proceedings listed in paragraph 59 above amounted to an interference with the applicants' right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

62. The parties have also agreed that each instance of the interference in question was "prescribed by law" and "pursued a legitimate aim" – that is to say "the protection of the reputation or rights of others", within the meaning of Article 10 § 2 of the Convention. It thus remains to be examined whether the interference was "necessary in a democratic society"; this requires the Court to ascertain whether it was proportionate to the legitimate aim pursued and whether the grounds given by the domestic courts were relevant and sufficient (see *Morice v. France* ([GC], no. 29369/10, § 144, ECHR 2015). The Court furthermore notes that each instance of the interference must be seen within the context of the essential role of a free press in ensuring the proper functioning of a democratic society (see, among many other authorities, *Skudayeva v. Russia*, no. 24014/07, § 30, 5 March 2019).

63. The Court will examine the issue of whether the interference was "necessary in a democratic society" in the light of the relevant principles developed in its case-law that were summarised, in particular, in *Novaya Gazeta and Milashina v. Russia* (no. 45083/06, §§ 55-57, 3 October 2017). In that context it will also take into account the general principles concerning the margin of appreciation and balancing the right to freedom of expression against the right to respect for private life (see *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 85-95, 7 February 2012; *Couderc and Hachette Filipacchi Associés v. France* ([GC], no. 40454/07, §§ 90-93, ECHR 2015 (extracts)); and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no.17224/11, § 77, 27 June 2017) as well as the long-established principle that the requirement to prove the truth of a value judgment – which is not susceptible of proof – is impossible to fulfil and infringes freedom of opinion itself (see, among many others, *Lingens v. Austria*, 8 July 1986, § 46, Series A no. 103, *Morice*, cited above, § 126; and *Fedchenko v. Russia (no. 3)*, no. 7972/09, § 41, 2 October 2018).

64. The Court has already found a violation of Article 10 of the Convention in a number of cases against Russia because the domestic courts did not apply standards that were in conformity with the standards of its case-law concerning freedom of the press (see *OOO Ivpress and Others v. Russia*, nos. 33501/04 and 3 others, § 79, 22 January 2013; *Kunitsyna v. Russia*, no. 9406/05, §§ 46-48, 13 December 2016; *Terentyev v. Russia*, no. 25147/09, §§ 22-24, 26 January 2017; *OOO Izdatelskiy Tsentr Kvartirnyy Ryad v. Russia*, no. 39748/05, § 46, 25 April 2017; *Cheltsova*

v. Russia, no. 44294/06, § 100, 13 June 2017; *Skudayeva*, cited above, §§ 36-39; and *Novaya Gazeta and Milashina*, cited above).

(b) Two sets of civil defamation proceedings

65. The Court will begin by assessing the interference in the form of the civil defamation proceedings. The District and Regional Courts approached the two distinct sets of defamation proceedings in a nearly identical manner, limiting themselves to establishing that the statements that they regarded as tarnishing Mr D.'s honour, dignity and business reputation had actually been disseminated and to observing that the defendants had not proved the truthfulness of those statements (see paragraphs 9, 11, 24 and 26 above). The Court thus deems it appropriate to consider the two sets of civil proceedings together.

66. The Court is not in a position to assess the level of seriousness of the alleged attack on Mr D.'s reputation, given that in each set of civil defamation proceedings, the District and Regional Courts did not assess whether the impugned statements could be regarded as constituting an actual attack capable of causing prejudice to the claimant's honour or business reputation, let alone his dignity. They did not seek to balance the interests of Mr D. in protecting his reputation against the interests of the public in (i) ensuring the transparency and accountability of the Governor's office or (ii) receiving information on matters of public concern. On the contrary, the domestic courts attached preponderant weight to Mr D.'s social status. Their reasoning appears to be based on the tacit assumption that interests relating to the protection of the honour and dignity of those vested with public powers prevail over freedom of expression in all circumstances. The District Court used a nearly identical wording in its judgments of 25 August 2009 and 22 September 2009 to emphasise the position of the claimant as "the highest official of the Tula Region" and implied that the functioning of the whole region depended on the Governor's "moral authority" (see paragraphs 9 and 24 above). The Court considers that, by failing to weigh the competing interests against each other, the domestic courts failed to perform the requisite balancing exercise (see *Skudayeva*, cited above, § 38).

67. Furthermore, in each set of civil defamation proceedings, the District and Regional Courts did not take account of: the respective roles of Mr Timakov as a journalist and the applicant company as an editorial and publishing house; the presence or absence of good faith on the applicants' part; the aim pursued by the applicants in publishing the article or by Mr Timakov in alleging that the Governor had earned the highest mark for corruption; the existence or otherwise of a matter of public interest or general concern that had been touched upon by the impugned statements; or the relevance of information regarding the Governor's allegedly corrupt practices. By omitting any analysis of such elements, the domestic courts

failed to pay heed to the essential function that the press fulfils in a democratic society (see *Skudayeva*, cited above, § 36).

68. Moreover, in both sets of civil proceedings the domestic courts did not discuss whether and to what extent the impugned statements were statements of fact or value judgments: the District Court posited as a starting point for the examination of the two defamation cases that they were the former; the Regional Court merely upheld the first-instance judgments without entering into this issue. Neither did the District and Regional Courts seek to establish whether the defendants in the defamation proceedings under consideration had had some factual grounds to claim that Governor D. had been involved in or condoned corrupt practices despite the latter's requests to admit the relevant documents into evidence (see paragraphs 9 and 24 above). While the Court acknowledges that the distinction between the two concepts may not necessarily appear clear-cut and may on occasion become a point of contention, it reiterates that, in order to distinguish between a factual allegation and a value judgment, it is necessary to take account of the circumstances of the case and the general tone of the remarks bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact (see, with further references, *Morice*, cited above, § 126). Reiterating that its task is not to take the place of the competent national authorities but to review the decisions that they made under Article 10 in order to ensure that the latter applied standards which were in conformity with the principles embodied in Article 10 and relied on an acceptable assessment of the relevant facts (see *Perinçek v. Switzerland* [GC], no. 27510/08, § 196, ECHR 2015 (extracts), the Court considers that, where a defendant in defamation proceedings alleges that an impugned statement is a value judgment rather than a statement of fact, it is incumbent on domestic courts to pay heed to her or his argument. However, the District and Regional Courts in the two sets of proceedings at hand failed to attempt to consider whether the impugned statements could be regarded as value judgment having a sufficient factual basis despite the defendants' insistence (see paragraphs 8 and 10 above), which the Court regards as an important omission.

69. The Court furthermore observes that the amounts awarded to Mr D. in the two above-mentioned sets of proceedings were very substantial. It is the Court's consistent case-law regarding defamation proceedings against journalists that the nature and severity of the penalties imposed are further factors to be taken into account when assessing the proportionality of an interference. Furthermore, the Court must be satisfied that the penalty does not amount to a form of censorship intended to discourage the press from expressing criticism. In the context of a debate on a topic of public interest, such a sanction is likely to deter journalists from contributing to the public discussion of issues affecting the life of the community. By the same token,

it is liable to hamper the press in performing its task as a purveyor of information and as a public watchdog (see *Bédat v. Switzerland* [GC], no. 56925/08, § 78, 29 March 2016).

70. The applicants emphasised that they had experienced the chilling effect of the disproportionately high awards (see paragraph 57 above). The Court accepts this argument, as the fact that the bailiffs' service had to resort to levying execution on and eventually seizing household items – including the piano that Mr Timakov's daughter had played (see paragraphs 29 and 32 above) – serves as a graphic illustration of the fact that the amount awarded to Mr D. by the judgment of 22 September 2009 (which was upheld on 18 March 2010) was largely beyond the financial resources available to the applicant. The adverse effect that the large award had on the applicant company – it was forced into dissolution because of its inability to pay off the judgment debt (see paragraph 16 above) – is even more salient. Yet nothing in the judgments of 25 August and 22 September 2009 (as upheld on 4 February and 18 March 2010, respectively) suggests that the domestic courts took into consideration, however briefly, the financial situation of the defendants or contemplated whether an award would be proportionate in the particular respective circumstances of each case. Instead they yet again attached preponderant weight to the Governor's social status – thus failing to apply the relevant Convention standards.

71. The above elements lead the Court to conclude that the reasons that the domestic courts cited in justifying the interference with the applicants' right to freedom of expression in the two sets of civil defamation proceedings may be described as "relevant" yet cannot be regarded as "sufficient". The domestic courts did not give due consideration to the principles and criteria as laid down by the Court's case-law for balancing the right to respect for private life and the right to freedom of expression. They thus exceeded the margin of appreciation afforded to them and failed to demonstrate that there was a reasonable relationship of proportionality between the two instances of interference in question and the legitimate aim pursued (see, *mutatis mutandis, Couderc and Hachette Filipacchi Associés*, cited above, § 153; *Ólafsson v. Iceland*, no. 58493/13, § 62, 16 March 2017; and *GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland*, no. 18597/13, § 79, 9 January 2018; see also *Skudayeva*, cited above, § 39, and *Nadtoka v. Russia (no. 2)*, no. 29097/08, § 50, 8 October 2019). The Court thus concludes that it has not been shown that the interference was "necessary in a democratic society".

(c) Criminal proceedings for libel

72. The Court furthermore notes that Mr Timakov, in addition to having to pay a disproportionately high price for expressing his opinion as a journalist and as a member of the regional legislature regarding Mr D.'s professional performance, was subject to criminal prosecution for libel in

respect of a statement that had been deemed (in the course of those civil proceedings) defamatory (see paragraphs 34-42 above). Given that both the civil defamation proceedings that the Court has assessed above (see paragraphs 65-71 above) and the criminal proceedings for libel stemmed from the same statement and ran for some time in parallel, the Court does not consider it necessary to address the remaining instance of interference (in the form of criminal proceedings for libel).

(d) Conclusion

73. In view of the Court's findings above that the interference with the applicants' right to freedom of expression was not "necessary in a democratic society" (see paragraph 71 above), there has been a violation of Article 10 of the Convention.

IV. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

74. In application no. 46232/10, the applicants complained – in the light of the District Court in-camera examination of Mr D.'s claim against the applicant and the applicant company – of a violation of their right to a public hearing. They relied on Article 6 § 1 of the Convention, which reads as follows:

> "1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

A. Submissions by the parties

75. The Government contested that argument. They submitted that the District Court had decided to hear the claim against the applicant and the applicant company in camera because of "exceptional circumstances", in accordance with domestic law and the Court's case-law. They did not provide any details by way of elucidating what those circumstances had been. They concluded that there had been no violation of Article 6 § 1 of the Convention.

76. The applicants asserted that there had been no reasons capable of justifying the exclusion of the press and the public from the defamation proceedings, given the fact that the issues discussed at the District Court hearing had pertained to Mr D.'s allegedly corrupt practices as Governor, and not to his private life.

B. The Court's assessment

1. Admissibility

77. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. Merits

78. The Court reiterates that Article 6 § 1 of the Convention provides that, in the determination of civil rights and obligations, "everyone is entitled to a fair and public hearing". The public character of proceedings protects litigants against the administration of justice in secret, with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1 – a fair hearing, the guarantee of which is one of the foundations of a democratic society. However, the requirement to hold a public hearing is subject to exceptions under Article 6 § 1, which provides that "the press and public may be excluded from all or part of the trial ... where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice" (see *Zagorodnikov v. Russia*, no. 66941/01, § 20, 7 June 2007; *Osinger v. Austria*, no. 54645/00, § 44, 24 March 2005; and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 189, 6 November 2018).

79. The Court points out that the applicants in application no. 46232/10, who were entitled to a public hearing by virtue of Article 10 of the CCP (see paragraph 48 above), did not waive it either expressly or tacitly (see, in the context of the proceedings before commercial courts, *Zagorodnikov*, cited above, § 25).

80. The Court observes that neither the District Court nor the Government advanced any specific reasons capable of justifying an in camera hearing in a civil defamation case. A mere reference to "exceptional circumstances" cannot suffice as a reason to circumvent a fundamental principle enshrined in Article 6 § 1 of the Convention – namely, that a court hearing must be held in public (see, *mutatis mutandis*, *Chaushev and Others v. Russia*, nos. 37037/03 and 2 others, § 22, 25 October 2016).

81. The Regional Court examined the appeal against the judgment of 25 August 2009 in a public hearing. The Court reiterates in this connection that the fact that proceedings before an appellate court are held in public cannot remedy the lack of a public hearing at the lower levels of jurisdiction where the scope of the appeal proceedings is limited, in particular where the appellate court cannot review the merits of the case, including a review of

the facts and, for example, an assessment as to whether a penalty was proportionate to the misconduct (see, with further references, *Ramos Nunes de Carvalho e Sá*, cited above, § 192). Furthermore, the Court has previously held that given the possible detrimental effects that the lack of a public hearing before the first-instance court could have on the fairness of the proceedings, the absence of publicity could not in any event be remedied by anything other than a complete rehearing before the appellate court (see *Khrabrova v. Russia*, no. 18498/04, § 52, 2 October 2012).

82. Given the broad scope of review accorded to appellate courts under Russian law in force at the material time (see *Gankin and Others v. Russia*, nos. 2430/06 and 3 others, § 40, 31 May 2016), the information before the Court does not indicate that the Regional Court could not rehear the case anew. In order to ensure the respect for the defendants' right to a public hearing, it would have been required that the Regional Court had taken steps by way of ensuring a complete rehearing of the case on appeal. The Court cannot but note that the Regional Court failed to do so. It is of particular importance that in its judgment of 4 February 2010 the Regional Court expressly refused to look into the essential issue of proportionality of the award to Mr D. to the alleged damage to his honour, dignity and business reputation and endorsed the findings that the District Court had reached in camera without providing any detailed reasons for doing so (see paragraph 11 above). Accordingly, in the circumstances of the present case the fact that the proceedings before the Regional Court were public is not sufficient to remedy the lack of a public hearing before the District Court (see, for similar reasoning, *Riepan v. Austria*, no. 35115/97, §§ 40-41, ECHR 2000-XII, and *Khrabrova*, cited above, § 52).

83. In the absence of any reasons that could justify hearing the civil defamation case against the applicants in camera, the Court finds that there has been a violation of Article 6 § 1 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. 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

85. In respect of pecuniary damage, Mr Timakov claimed 37,120 Russian roubles (RUB) (502[2] euros (EUR)) in compensation for the amount paid in execution of the judgment of 25 August 2009, and RUB 76,800 (EUR 1,040) in compensation for the amounts paid in the execution of the judgment of 22 September 2009.

86. In respect of non-pecuniary damage, Mr Timakov claimed EUR 15,000 as regards applications nos. 46232/10 and 74770/10. Mr Timakov and Mr Leonov, the only shareholders of the dissolved applicant company, claimed in its name EUR 4,000 under the same head as regards application no. 46232/10, requesting that any award be paid into Mr Leonov's bank account.

87. The Government submitted that the amounts paid by Mr Timakov to Mr D. had been necessary for the execution of the judgments and that the "amount recovered for non-enforcement of an enforcement document without important reasons" was compulsory under Russian law. They further submitted that the amounts claimed in respect of non-pecuniary damage were excessive and that no award in this respect should be made in view of the absence of a violation of the Convention. They furthermore asserted that the applicant company's claim was unfounded as it had ceased to exist as a legal entity.

88. The Court awards Mr Timakov EUR 1,542 in respect of pecuniary damage. It further awards, in respect of non-pecuniary damage, EUR 9,750 to Mr Timakov as regards applications nos. 46232/10 and 74770/10, as well as EUR 2,925 to Mr Leonov as regards application no. 46232/10 and his claim made on behalf of the applicant company.

B. Costs and expenses

89. The applicants claimed RUB 1,055 (EUR 14) in postal and administrative fees and RUB 7,565 (EUR 102) in court and postal fees sustained as a result of the civil proceedings (application no. 46232/10). Mr Timakov further claimed RUB 25,000 and RUB 15,000, that is, the total of RUB 40,000 (EUR 540) in legal fees and RUB 15,204 (EUR 206) in postal and administrative fees, as well as the transport fees incurred by his lawyer as a result of the criminal proceedings (application no. 74770/10). As regards the costs and expenses incurred before the Court, the applicants claimed RUB 336,145 (EUR 4,547) in postal, legal and translation fees in respect of both applications. In total, the applicants claimed RUB 399,969

[2] The amounts in roubles in this section are converted into euros using the exchange rate established on the date of submission of the applicants' claim under Article 41 of the Convention.

(EUR 5,410) under this head. They supported their claim by relevant documents.

90. The Government submitted that the amounts claimed for postal and administrative fees as well as for legal fees incurred at the national level in connection with all sets of proceedings in respect of both applications were "not relevant to the consideration of the applicant's case by the European Court". Court fees were compulsory, and had to be paid "irrespective of the outcome of the case". The claim for RUB 15,000 in legal fees was unsubstantiated, as the supporting document listed by the applicants was missing. The Government concluded that the claim in the amount of RUB 336,145 was "subject to dismissal since [the applicants'] rights [had not been] violated".

91. The Court points out that a retainer agreement stipulating that RUB 15,000 be paid to Mr Timakov's lawyer in connection with the proceedings under Article 129 § 1 of the Criminal Code at the moment of the conclusion of that agreement was enclosed with the applicants' claim for just satisfaction, which was forwarded to the Government in due course. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 5,410, to cover costs under all heads.

C. Default interest

92. 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,

1. *Decides*, unanimously, to join the applications;

2. *Holds*, unanimously, that the applicant company's shareholders, Mr Timakov and Mr Leonov, have *locus standi* under Article 34 of the Convention to pursue the proceedings in the applicant company's stead;

3. *Declares*, unanimously, the applications admissible;

4. *Holds*, unanimously, that there has been a violation of Article 10 of the Convention;

5. *Holds*, by six votes to one, that there has been a violation of Article 6 § 1 of the Convention;

6. *Holds*, unanimously,

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
   (i) EUR 1,542 (one thousand five hundred and forty-two euros), plus any tax that may be chargeable, in respect of pecuniary damage, to Mr Timakov;
   (ii) EUR 9,750 (nine thousand seven hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to Mr Timakov as regards applications nos. 46232/10 and 74770/10, as well as EUR 2,925 (two thousand nine hundred and twenty-five euros) to Mr Leonov as regards application no. 46232/10 and his claim made on behalf of the applicant company;
   (iii) EUR 5,410 (five thousand four hundred and ten euros), plus any tax that may be chargeable to Mr Timakov, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

7. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 8 September 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Paul Lemmens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Lemmens and Schembri Orland are annexed to this judgment.

P.L.
M.B.

PARTLY DISSENTING OPINION OF JUDGE LEMMENS

1. I agree with the finding of a violation of Article 10 of the Convention. To my regret, however, I disagree with the finding that there has also been a violation of Article 6 § 1.

In my opinion, the decision on Article 6 § 1 is incompatible with the principles developed in the Court's case law. Moreover, I am afraid that it will be difficult to implement the new approach in practice. In any event, the majority's decision will open a Pandora's Box and lead to litigation that will deflect the attention of the courts, in particular the supreme courts, away from what really matters.

2. In the present case, there was an *in camera* hearing before the district court (court of first instance), but a public hearing took place before the regional court (appellate court). The question is whether the lack of a public hearing before the lower instance was remedied by the public hearing at the appeal stage.

Where the appeal is brought before an appellate court that has "full jurisdiction", the public hearing before that court can in principle remedy the lack of a public hearing before the lower court (see, e.g., *A. v. Finland* (dec.), no. 44998/98, 8 January 2004; *Buterlevičiūtė v. Lithuania*, no. 42139/08, §§ 53-54, 12 January 2016; and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 192, 6 November 2018).

By contrast, where the scope of the appeal proceedings is limited, and in particular where the appellate court cannot review the merits of the case, the public hearing before that court cannot remedy the lack of a public hearing before the lower court (see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 60, Series A no. 43; *Albert and Le Compte v. Belgium*, 10 February 1983, § 36, Series A no. 58; *Riepan v. Austria*, no. 35115/97, § 37, ECHR 2000-XII; *Malhous v. the Czech Republic* [GC], no. 33071/96, § 62, 12 July 2001; *Khrabrova v. Russia*, no. 18498/04, § 52, 2 October 2012; *Ramos Nunes de Carvalho e Sá*, cited above, § 192).

For the purposes of the requirement of a public hearing, the jurisdiction of the appellate court must be such that it can conduct a "complete rehearing" of the case (see *Riepan*, cited above, § 40, and *Khrabrova*, cited above, § 52).

These are the long-standing principles developed in the Court's case law, and they are reflected in paragraph 80 of the judgment.

3. It is important to note that what is decisive according to these principles is the scope of the jurisdiction of the appellate court. The jurisdiction of an appeal court, which can re-examine the claim *de novo*, is different from that of a court of cassation or a constitutional court, which looks at the dispute through a much narrower lens.

Jurisdiction is about the power which a court has to hear cases. It is not about the actual use which the court has made of that power in a given case.

It is precisely on this point that I respectfully disagree with the majority.

4. The majority do not deny that the regional court could "rehear the case anew". They consider, however, that that court failed to ensure a complete rehearing in the present case. They point in particular to the fact that the regional court "expressly refused to look into the essential issue of proportionality of the award to Mr D.",instead endorsing the relevant findings of the district court "without providing any detailed reasons for doing so" (paragraph 81 of the judgment).

I would not rule out the possibility of arguing that the regional court failed to properly examine an essential argument raised by the applicants, and thus failed to ensure the fairness of the trial. But that is not the point here. The present complaint is not about the fairness of the trial, but only about the public character of the hearing.

Whether or not the appellate court went deeply into the matter, whether or not it looked into all essential issues raised by the parties, and whether or not it gave reasons for its decisions, all that has nothing to do with the scope of its jurisdiction. Even a court that has "full jurisdiction", in the most literal sense, can make minimal use of its powers, perhaps even arriving at an unlawful or arbitrary decision. The thoroughness of the investigation carried out by a court in a given case does not and cannot have an impact on the scope of its jurisdiction for the category of cases to which that case belongs.

In my opinion, if under domestic law the appellate court *can* rehear the case anew, the publicity of the hearing before that court remedies the lack of publicity of the hearing at first instance. It is irrelevant how the appellate court *actually* dealt with the case, and in particular whether or not its judgment *actually* dealt anew with all the aspects of the case.

The majority depart from the relevant principle by making the remedial capacity of a public hearing before the appellate court, in effect, dependent on the intensity of its scrutiny. There is no support in the case-law of the Court for such a novel approach.

5. The majority's approach will be difficult to implement in practice.

Where there has not been a public hearing at first instance and where an appeal is brought before an appellate court, the latter court should know from the outset whether by holding a public hearing it will be able to remedy the defect before the lower court (and can thus proceed to examine the merits of the appeal), or whether it will in any event be required under Article 6 § 1 of the Convention to send the case back to the lower court for a complete rehearing by that court (provided that such a possibility of remitting the case exists under domestic law). The majority's decision makes it impossible for the appellate court to make such a determination. It is only after the appellate court has examined the appeal and delivered its judgment that an assessment can be made of whether the public hearing before the appellate court has remedied the deficiency that occurred at first instance.

This means that such an assessment can only be made by a court that stands above the appellate court in the judicial hierarchy: that is to say a supreme court or a constitutional court.

Such a situation leads to legal uncertainty in the proceedings before the appellate court itself. That court is walking in the dark. Others will have to shed light on the publicity issue.

6. It is also obvious that the majority's approach may lead to unnecessary litigation. The losing party may find ammunition in the present judgment to challenge the appellate court's decision (before the supreme court or the constitutional court) by simply arguing that the examination of the case at the appellate level was "not sufficient", or not sufficiently intense, to cure the formal defect of lack of a public hearing at first instance. It may argue that it is no longer necessary to demonstrate that the appellate court's decision violates the law. Even a legally correct decision, handed down after a fair trial, could run the risk of being censored by a higher court, simply because the appellate court considered that it could deal with the case by endorsing the findings of the first-instance court without providing further reasons of its own.

I hope that domestic courts will not fall into that trap. But I can see unnecessary litigation looming.

7. For the reasons set out above, I would conclude that there has been no violation of Article 6 § 1 of the Convention.

CONCURRING OPINION OF JUDGE SCHEMBRI ORLAND

1. I fully agree with the conclusions reached in this case but respectfully disagree with the Court's decision to abstain from addressing the interference represented by the criminal proceedings for libel.

2. In this case, the applicant and the publishing company were subjected to three sets of defamation proceedings, two civil and one criminal. The applicant was a journalist and himself a member of the regional legislature. The content of the comments at which Mr D (the alleged victim in the ordinary domestic proceedings) took umbrage concerned corruption at the highest level of regional government. It is undisputed that the domestic courts made sizeable awards against both applicants in respect of non-pecuniary damage, resulting in the ultimate folding of the publishing company and in severe financial loss.

3. Yet this was unsatisfactory for Mr D, and it appears that the investigative authority was repeatedly requested to file a criminal action against the applicant. Ultimately, superior orders prevailed despite the reluctance shown by the investigators, and Mr D was successful in having criminal proceedings brought against the applicant. A reading of the list of the penalties applicable in the event of a finding of guilt is in itself rather chilling – a fine of up to RUB 125,000 or in the amount of a convict's salary for the period of up to a year; 180 to 240 hours of forced labour; twelve to twenty-four months of community service; or three to six months' detention.

4. Mr D. at the time still enjoyed the powers of his office, and the pursuit of criminal proceedings against the applicant, in parallel with civil proceedings, was a disproportionate unleashing of State power which could only have had one aim – to silence the applicant through intimidation. The civil courts attached preponderant weight to Mr D's social status, so it is not surprising that the court of first instance failed to consider the public-interest aspect of the statements and to balance the different interests in play. Even prior to the finding of guilt, the applicant was ordered not to leave his residence, a measure which further restricted his freedom.

5. The applicant was eventually found guilty of criminal libel by the first-instance court, although no actual punishment was imposed. These charges were then dropped and the criminal proceedings were terminated for lack of the constituent elements of the crime.

6. In paragraph 71 of its judgment the Court noted the disproportionately high price the applicant had had to pay (in the civil proceedings) for expressing his opinion and the fact that, in addition, he had been subjected to criminal prosecution for libel in respect of the statement which had been the subject matter of the civil proceedings. The Court then found as follows: "Given that both the civil defamation proceedings that the Court has

assessed above (see paragraphs 64-70 above) and the criminal proceedings for libel stemmed from the same statement and ran for some time in parallel, the Court does not consider it necessary to address the remaining instance of interference (in the form of criminal proceedings for libel)."

7. The Court should, respectfully, have taken the opportunity to examine the severity of the interference represented by the institution and conclusion of the criminal proceedings for defamation and reinforced its case-law on criminal defamation. In the case at hand, not only were civil remedies available and under way, but the criminal penalties for which the applicant was liable comprised grave sanctions such as forced labour and imprisonment. These sanctions clearly exceeded the limits of what should be deemed "necessary in a democratic society" in a case where the applicant exercised his right of political and journalistic speech in relation to the actions of a public figure, and where the public-interest content was undisputed. Nothing indicates that the content of the alleged defamatory remarks was exceptional, such as to warrant the institution of criminal proceedings against the applicant.

8. Although the applicant was ultimately relieved of punishment, this does not alter the fact that the criminal proceedings hung over his head like the proverbial sword of Damocles, concurrently with his being ordered to pay significant sums in civil proceedings, and that he was ultimately convicted of a criminal offence at first instance.

9. There can be no doubt that an allegation of corruption against a public official is a matter of public interest deserving of strong protection. Indeed, the Court has consistently held that the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual (see *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103). Furthermore, the press and the media have a pre-eminent role in a State governed by the rule of law as they afford the public one of the best means of discovering and forming an opinion on the ideas and attitudes of their political leaders (see *Castells v. Spain,* 23 April 1992, § 43, Series A no. 236).

10. It is true that the Court, when examining whether the interference is "necessary in a democratic society", has not gone so far as to hold that the criminalisation of defamation is in itself a disproportionate interference (see, for example, *Prager and Oberschlick v. Austria*, 26 April 1995, Series A no. 313, a case which involved a conviction for defamation of a judge). However, the Court has held that even when the criminal sanction is the lightest possible, such as a conviction accompanied by a discharge in respect of the criminal sentence and an award of only a "symbolic euro" for damages, this may nonetheless have a dissuasive effect on the exercise of freedom of expression, a factor which must be taken into account in assessing the proportionality of the interference (see *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298*; Brasilier v. France*,

no. 71343/01, § 43, 11 April 2006; and *Morice v. France* [GC], no. 29369/10, § 176, ECHR 2015). In *Reichman v. France* (no. 50147/11, § 73, 12 July 2016) the Court, referring to its judgment in *Perinçek v. Switzerland* [GC][3], held that the very pronouncement of a criminal conviction was "one of the most serious forms of interference with the right to freedom of expression, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies". In *Cumpănă and Mazăre v. Romania* ([GC], no. 33348/96, § 115, ECHR 2004-XI), the Court held that the imposition of a prison sentence for a press offence "will be compatible with journalists' freedom of expression ... only in exceptional circumstances, notably ... in the case of hate speech or incitement to violence."

11. Given the essential role of press freedom in a democratic society, it is regrettable that the Court decided to overlook this opportunity to further reinforce the restrictive application of criminal sanctions for defamation and libel. This is all the more imperative when one considers that criminal sanctions, when compared with civil remedies, carry a greater potential to generate a chilling effect on the media and on freedom of expression generally.

[3] [GC], no. 27510/08, § 273, ECHR 2015 (extracts).