



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

THIRD SECTION

CASE OF RASHKIN v. RUSSIA

(Application no. 69575/10)

JUDGMENT

Art 10 • Freedom of expression • Member of Parliament from the opposition held liable for defamation towards peer from the governing party in a virulent political speech • Domestic courts' failure to give relevant and sufficient reasons for such finding in view of Art 10-related standards (context of political speech, tolerance to criticism expected from political figures), coupled with unusually large award calling for stringent scrutiny

STRASBOURG

7 July 2020

FINAL

16/11/2020

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

In the case of Rashkin v. Russia,

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

Paul Lemmens, *President*,
Georgios A. Serghides,
Helen Keller,
Dmitry Dedov,
Alena Poláčková,
María Elósegui,
Lorraine Schembri Orland, *judges*,

and Olga Chernishova, *Deputy Section Registrar*,

Having regard to:

the application (no. 69575/10) 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 Valeriy Fedorovich Rashkin (“the applicant”), on 11 November 2010;

the decision to give notice to the Russian Government (“the Government”) of the complaint concerning the finding of the applicant’s liability in defamation and to declare inadmissible the remainder of the application;

the parties’ observations;

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

Having deliberated in private on 9 June 2020,

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

INTRODUCTION

1. The case concerns the finding of a member of parliament liable in defamation in connection with a speech he made at a political rally.

THE FACTS

2. The applicant was born in 1955 and lives in Saratov. He was represented before the Court by Mr K. Serdyukov, a lawyer practising in Moscow.

3. The Government were represented initially by Mr G. Matyushkin, the Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

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

5. At the material time the applicant was a member of parliament from the opposition Communist Party. On 7 November 2009, at a meeting in

Saratov held to celebrate the 92nd anniversary of the Bolshevik Revolution, he accused the powers-that-be of “crimes against the Russian nation”:

“We can point to at least six crimes against the people, against the Russian nation, perpetrated by those authorities, starting from Yeltsin and his camarilla and ending with Putin and Medvedev ...

... All these crimes weigh heavily on the powers that were behind the 1991 coup, on the Yeltsins, Volodins, Sliskas, Medvedevs, and Putins. The crimes are on them and can only be washed away with blood. With blood should they wash away the disgrace they have brought upon us.”

6. Mr Volodin, a member of parliament from the ruling United Russia party elected in the Saratov Region, lodged a defamation claim against the applicant in connection with the second part of the above statement.

7. On 7 April 2010 the Leninskiy District Court of Saratov granted the claim, finding as follows:

“The court considers that in his speech Mr Rashkin made a factual statement that Mr Volodin had committed crimes against the people and the nation, and the speech reflected directly on the plaintiff. The court has arrived at this conclusion on the following grounds.

Mr Volodin is well-known in Saratov because he is an MP representing the Saratov Region... Despite the fact that the defendant used the last name of the plaintiff in the plural form, the court agrees ... that Mr Rashkin used the method of ‘incomplete naming of the person referred to’ ... The last name was used in the plural form, and the first name and patronymic were not mentioned. However, a considerable number of citizens and voters will realise that the statement refers to Mr Volodin who represents the Saratov Region in State bodies ...

The court considers that Mr Rashkin’s speech... contained factual statements suggesting that Mr Volodin had breached the criminal law and describing the plaintiff negatively ... Moreover, the factual statements are untrue, given that the plaintiff did not participate in the 1991 events as he was teaching at the university at the time and was a member of the local parliament ...

...

The plaintiff represents the voters of the Saratov Region in the State bodies and heads the United Russia party... and holds senior positions, including those of vice-speaker and deputy chairman of the State Duma, which makes the damage to his business reputation, honour and dignity substantial.”

The District Court ordered the applicant to pay Mr Volodin 1,000,000 Russian roubles (25,640 euros) in respect of non-pecuniary damage.

8. On 19 May 2010 the Saratov Regional Court upheld the judgment on appeal.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

9. The applicant complained that holding him liable for defaming another MP had violated his right to freedom of expression 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 and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others...”

A. Admissibility

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

B. Merits

11. The applicant submitted that the Russian courts had not considered the case in conformity with the principles embodied in Article 10 of the Convention. He was an opposition politician and a member of parliament and, as such, his speech should have enjoyed the enhanced protection under that provision. He had not accused Mr Volodin of any specific offence; he had imputed responsibility for crimes against people to the powers-that-be in general rather than to particular individuals. The amount of the award had imposed an excessive burden on him; he had sold some of his property to pay the award. Many cases to which the Government referred below concerned high-ranking State officials in whose favour large awards had been made.

12. The Government submitted that the applicant had wrongly accused Mr Volodin of committing crimes against the Russian nation. The impugned statements had not been founded on verified or verifiable information and had been capable of causing actual damage to the MP's standing, undermining his professional integrity or qualification in the eyes of the public. The applicant's allegations had overstepped the limits of permissible criticism and the interference had been necessary to suppress unfounded accusations. The amount of compensation had been determined by reference to moral anguish which Mr Volodin had suffered. An elected representative

of the people and a lawmaker, he had been accused of committing crimes and breaching the law. The Government cited cases in which similar awards had been made.

13. The Court accepts that the finding of the applicant's liability and the award of damages against him constituted interference with his right to freedom of expression. The interference had a lawful basis, notably Article 152 of the Civil Code, which allowed an aggrieved party to seek the judicial protection of his reputation and claim compensation in respect of non-pecuniary damages (see, for the text of the provision, *Novaya Gazeta and Milashina v. Russia*, no. 45083/06, § 36, 3 October 2017). It also pursued a legitimate aim, that of protecting the reputation or rights of others, within the meaning of Article 10 § 2. It remains to be established whether the interference was "necessary in a democratic society".

14. In reviewing under Article 10 the domestic courts' decisions, the Court has to satisfy itself that the national authorities 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)). General principles concerning the margin of appreciation and balancing the right to freedom of expression against the right to respect for private life laid down in the Court's case-law were summarised in *Axel Springer AG v. Germany* ([GC], no. 39954/08, §§ 85-95, 7 February 2012). The following elements need to be taken into account: the position of the applicant, the position of the person against whom his criticism was directed, the context and object of the impugned statement, its characterisation by the domestic courts, and the sanction imposed (see *Krasulya v. Russia*, no. 12365/03, § 35, 22 February 2007).

15. As regards the applicant's position, the Court notes that he was a member of parliament from an opposition party. It reiterates that, while freedom of expression is important for everybody, it is especially so for elected representatives of the people. They represent their electorate, draw attention to their preoccupations and defend their interests. Accordingly, interference with the freedom of expression of an opposition member of parliament, like the applicant, calls for the closest scrutiny (see *Castells v. Spain*, 23 April 1992, § 42, Series A no. 236, and *Jerusalem v. Austria*, no. 26958/95, § 36, ECHR 2001-II). Statements by members of parliament, whether made inside or outside the chambers of parliament, are political speech *par excellence* (see *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 137, 17 May 2016).

16. The applicant's procedural adversary, Mr Volodin, was also a member of parliament, but elected from the governing party. As a career politician who inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, he should be prepared to display a greater degree of tolerance and accept wider limits of criticism. The requirements of the protection of a politician's reputation had to be weighed against the interests of open discussion of

political issues (see *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 59, Series A no. 204).

17. The applicant made a speech at a meeting of the Communist Party's supporters. He named Mr Volodin among the past and present politicians whom he believed to be responsible for the ills that have befallen the country in the wake of the 1991 coup d'état, an attempted seizure of power from the Soviet President Gorbachev which was claimed to have precipitated the demise of the Communist Party and the collapse of the USSR. His statement thus constituted a declaration of collective political responsibility rather than an accusation of specific criminal-law offences. As a form of political expression, it enjoyed a high level of protection under Article 10 of the Convention, since very strong reasons are required for justifying restrictions on political speech (see *Morice v. France* [GC], no. 29369/10, § 125, ECHR 2015). The Court also reiterates that it is in the nature of political speech to be controversial and often virulent (see *Perinçek*, cited above, § 231, with further references).

18. When considering Mr Volodin's claim, the domestic courts did not address the context in which the impugned comments had been made or acknowledge the parties' role as political actors. Their decisions were confined to the assessment of damage which Mr Volodin's reputation may have suffered in connection with the applicant's remarks and the lack of substantiation of what they considered to be factual allegations of criminal conduct. They failed to recognise that there was little scope under Article 10 § 2 of the Convention for restrictions on speech which, as the speech in the instant case, was political in nature. Nor did they attempt to perform a balancing exercise between the need to protect the plaintiff's reputation and the applicant's right to freedom of expression. Those failings call for the conclusion that the domestic courts did not "apply standards which were in conformity with the principles embodied in Article 10" and failed to give relevant and sufficient reasons to justify the interference (see *Terentyev v. Russia*, no. 25147/09, § 24, 26 January 2017).

19. Finally, as regards the severity of the sanction, the Court reiterates that unpredictably large awards in defamation cases are capable of having a chilling effect on the freedom of expression and therefore require the most careful scrutiny on its part (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999-III, and *Kasabova v. Bulgaria*, no. 22385/03, § 71, 19 April 2011). Mr Volodin was awarded RUB 1,000,000 in respect of non-pecuniary damage, that is to say more than EUR 25,000 at the material time. That award was unusually high in absolute terms but also many times higher in relation to awards in comparable defamation cases that have come before the Court (see, for example, *Grinberg v. Russia*, no. 23472/03, § 12, 21 July 2005 – RUB 2,500 to the Governor of the Ulyanovsk Region out of the RUB 500,000 he had claimed; *Fedchenko v. Russia*, no. 33333/04, § 15, 11 February 2010 – RUB 5,000 to a member of Parliament out of the RUB 500,000 he had claimed; *Novaya Gazeta and Borodyanskiy v. Russia*,

no. 14087/08, § 15, 28 March 2013 – RUB 60,000 to the Governor of Omsk out of the RUB 500,000 he had claimed).

20. The Court reiterates that awards of that magnitude will trigger a heightened scrutiny of their proportionality (see *Pakdemirli v. Turkey*, no. 35839/97, § 59, 22 February 2005, and *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal*, no. 1529/08, § 54, 29 March 2011). An award of damages must bear a reasonable relationship of proportionality to the injury to reputation suffered (see *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, no. 55120/00, §§ 110-13, ECHR 2005-V (extracts), and *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, §§ 48-51, Series A no. 316-B). However, when making the pecuniary award against the applicant, the domestic courts failed to carry out a serious assessment of its proportionality in relation to the applicant's financial situation and resources (compare *Kwiecień v. Poland*, no. 51744/99, § 56, 9 January 2007). As to their justification for granting such a large amount in damages because the plaintiff was a politician and a well-known public figure, this position sits ill with the Convention-compliant approach that prominent political figures, such as a member of parliament for the ruling party in the instant case, should be prepared to tolerate strongly worded criticism and may not claim the same level of protection as a private individual unknown to the public, especially when the statement did not concern their private life or intrude on their intimacy (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 84 and 123, ECHR 2015 (extracts)). In these circumstances, the Court finds that a high award of damages to Mr Volodin did not pursue a "pressing social need" and was not "necessary in a democratic society" (compare *I Avgi Publishing and Press Agency S.A. and Karis v. Greece*, no. 15909/06, § 35, 5 June 2008).

21. Having regard to the Russian courts' failure to apply the principles embodied in Article 10 of the Convention and the excessive amount of the award against the applicant, the Court finds a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

22. 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."

23. The applicant asked the Court to determine the amount of compensation. The Government submitted that the claim was to be rejected because the amount claimed had not been specified.

24. Pursuant to Rule 60 § 1 of the Rules of Court, an applicant who wishes to obtain an award of just satisfaction in respect of pecuniary damage or of costs and expenses must make a specific claim to that effect.

Since in the present case the applicant failed to specify the amounts claimed, the Court makes no award under these heads (Rule 60 § 3) (see *Narodni List D.D. v. Croatia*, no. 2782/12, § 77, 8 November 2018).

25. By contrast, since non-pecuniary damage does not, by its nature, lend itself to precise calculation, Rule 60 does not prevent the Court from examining claims for non-pecuniary damage which applicants did not quantify, leaving the amount to the Court's discretion (see *Nagmetov v. Russia* [GC], no. 35589/08, § 72, 30 March 2017). Making an assessment on an equitable basis, the Court awards the applicant EUR 7,800 in respect of non-pecuniary damage, plus any tax that may be chargeable.

26. 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. *Declares*, unanimously, the application admissible;
2. *Holds*, by four votes to three, that there has been a violation of Article 10 of the Convention;
3. *Holds*, by four votes to three,
 - (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 7,800 (seven thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 7 July 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova
Deputy 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 Serghides, Dedov and Elósegui are annexed to this judgment.

P.L.
O.C.

DISSENTING OPINION OF JUDGE SERGHIDES

1. The applicant, who was an MP at the material time, complained before the Court that in holding him liable for defaming another MP, Mr Volodin, the respondent State had violated his right to freedom of expression under Article 10 of the Convention. The applicant, *inter alia*, “made a factual statement that Mr Volodin had committed crimes against the people and the nation”, thereby “suggesting that Mr Volodin had breached the criminal law”, which statements the domestic courts found untrue (see decision of the District Court cited in paragraph 6 of the judgment, upheld by the Regional Court on appeal, see paragraph 7 of the judgment).

2. I respectfully disagree with the judgment in finding that there has been a violation of the applicant’s right to freedom of expression under Article 10 of the Convention.

3. I have had the privilege to read in advance the dissenting opinions of my distinguished colleagues, Judge Dedov and Judge Elósegui, with whom I agree.

4. I nevertheless decided to write a completely separate opinion rather than to join one of them or to reiterate in my opinion all or some of their arguments.

5. The reason for my opinion is to deal briefly with one important issue, namely that of the conflict or clash between different human rights, an issue, as can be seen from the judgment, which appears to arise in the present case, namely: the conflict between the applicant’s right to freedom of expression under Article 10 and Mr Volodin’s right to the protection of his reputation or private life under Article 8 the Convention.

6. It has been rightly argued “that where the exercise of a right impedes the exercise of another right, in other words there is a conflict of rights, the impeding right must be characterised as an interference”¹. Both Articles 10 and 8 are at issue in the present case; they contain limitations which include as a legitimate aim “the protection of the rights and freedoms of others”, Article 10 also providing for “the protection of the reputation ... of others”, this being one of the issues at hand. In the present case Mr Volodin’s right

¹ See Gerhard Van der Schyff, *Limitation of Rights – A Study of the European Convention and the South African Bill of Rights*, Tilburg, The Netherlands, 2005, at p. 42.

to the protection of his private life may be characterised as an interference with the applicant’s right to freedom of expression.

7. The principle of the indivisibility of rights², which is based on the idea of an integral relationship between human rights and rejects any legal hierarchy between them, cannot help in resolving a clash of human rights.

8. Neither can the principle of effectiveness³ as a norm of international law, enshrined in each Convention provision, which secures a conflicting right in a particular case – in the present case, Articles 10 and 8 – resolve the clash, because this norm, which is equally important in each provision, is the guardian for the effective protection of every right to which it applies.

9. In my view, however, the principle of effectiveness, together with the principle of proportionality, can assist in resolving a conflict of human rights using the following methodology. The principle of effectiveness as a norm of international law in a Convention provision which secures a human right, in the present case Article 10, which is in conflict with another human right, in the present case the right to private life under Article 8, will assist in determining the extent to which one right could be impaired by the conflict if the other right is to prevail. Similarly, this test will be applied regarding the other Convention provision and right, which is in conflict with

² See on the indivisibility of human rights, Ernst-Ulrich Petersmann, “On ‘Indivisibility’ of Human Rights”, in *EJIL* (2003), Vol. 14, No. 2, p. 381 *et seq.*; Victoria Hamlyn, “The Indivisibility of Human Rights: Economic, Social and Cultural Rights and the European Convention on Human Rights”, in (2008) 40 *Bracton Law Journal* 13 *et seq.*; Lisa J. Laplante, “On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development” (2007) 10 *Yale Human Rights and Development Law Journal*, 141 *et seq.*; Leckie Scott, “Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights”, (1998) 20 *Human Rights Quarterly* 81 *et seq.*; Daniel J. Whelan, *Indivisible Human Rights: A History*, Pennsylvania, 2010.

³ On this principle, see, *inter alia*, Case “relating to certain aspects of the laws on the use of languages in education in Belgium” (merits), 23 July 1968, pp. 24, 26, Series A no. 6; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 123, ECHR 2005-I; Rietiker, Daniel, “The principle of ‘effectiveness’ in the recent jurisprudence of the European Court of Human Rights: its different dimensions and its consistency with public international law – no need for the concept of treaty *sui generis*”, *Nordic Journal of International Law*, 79 (2010), pp. 245 *et seq.*; Georgios A. Serghides, “The Principle of Effectiveness in the European Convention on Human Rights, in Particular its Relationship to the Other Convention Principles”, in (2017), 30, *Hague Yearbook of International Law*, 1 *et seq.*; Georgios A. Serghides, “The Principle of Effectiveness as Used in Interpreting, Applying and Implementing the European Convention on Human Rights (its Nature, Mechanism and Significance)”, in Iulia Motoc, Paulo Pinto de Albuquerque and Krzysztof Wojtyczek, *New Developments in Constitutional Law – Essays in Honour of András Sajó*, The Hague, 2018, pp. 389 *et seq.* See also a pertinent and recent collection of relevant works prepared by Daniel Rietiker, “Effectiveness and Evolution in Treaty Interpretation”, Oxford Bibliographies (last modified 25 September 2019):

<https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0188.xml>

the first, and it “can be characterised as an interference” with the first. In this connection, it should be emphasised that a right, the core of which is negated or negatively affected will be subjected to a greater impairment than a right of which only one aspect – a non-essential aspect – is negatively affected.

10. Subsequently, the principle of proportionality will be employed, by weighing in the balance, not the two rights which are equal, but the impairment that each right will potentially sustain in the conflict. Then the conflict can be resolved by finding out which right is affected by the conflict to a greater extent. The above methodology, using the principle of effectiveness as a norm together with the principle of proportionality, is employed here by using the principle of effectiveness as a method of interpretation, which seeks to find the best interpretative approach in resolving a conflict of rights.

11. From another perspective, the conflict can be resolved by using the principle of effectiveness as a norm of international law enshrined in the notion of “victim” in Article 34 of the Convention, which is also enshrined in all substantive Convention provisions, thus in Articles 10 and 8 through the use of the term “everyone”, and by comparing the damage that an applicant before the Court, thus an alleged victim, has sustained with the damage the other person – whose right is in conflict – would have sustained had the applicant’s right not been exercised.

12. This victim-centred test is in essence the same as the rights-centred test, because ultimately the alleged victim will have sustained more damage if the core of his or her right is overridden, compared to the damage sustained by the other person, whose core right has remained unaffected, with only one non-essential aspect being negatively affected. It is, I believe, the Convention’s aim and one of the properties of the principle of effectiveness as a norm of international law in general – and not just as an element of a Convention provision – that greater protection should be given to a right and to a victim which/who will suffer more damage from a conflict of rights and are in a weaker or more vulnerable situation, respectively.

13. In the present case, to find a violation of Article 10, as the majority did, would affect more negatively the right to the protection of reputation or of private life of Mr Volodin (the plaintiff in the domestic proceedings) under Article 8 of the Convention, and himself as a victim, having been falsely accused by the applicant of criminal acts, than would be affected the applicant’s right to freedom of expression under Article 10, and himself as a “victim”, had the Court found no violation of Article 10 of the Convention, as is the opinion of the three dissenters.

14. The applicant, by falsely accusing Mr Volodin of having committed crimes, blatantly violated his right to the protection of his reputation and his private life under Article 8 of the Convention. The core of Mr Volodin’s

right to private life, including his reputation, has been impaired by these accusations. By restraining the applicant from making such statements, his own right to freedom of expression under Article 10 would have suffered no damage as this right does not include the expression of false accusations of criminal actions, as my two distinguished colleagues have rightly demonstrated. False accusations about someone committing crimes cannot be considered as contributing to a debate of general interest.

15. By concluding that the applicant would have suffered no damage to his rights if prevented by the domestic courts from making defamatory statements, it can thus be seen, through the above methodological approach, that in fact there has been no clash between rights in the present case. It should be emphasised that Article 10 of the Convention does not protect individuals, even in a political context, from being punished for making false statements imputing criminal liability to innocent persons, whose reputation will be damaged as a result.

DISSENTING OPINION OF JUDGE DEDOV

1. I regret that the Chamber has divided on the issue of balancing conflicting interests within the interpretation of Article 10 of the Convention. In paragraph 16 of the judgment the majority of judges have concluded that the applicant's statement "constituted a declaration of collective political responsibility rather than an accusation of specific criminal-law offences. As a form of political expression, it enjoyed a high level of protection under Article 10 of the Convention, since very strong reasons are required for justifying restrictions on political speech (see *Morice v. France* [GC], no. 29369/10, § 125, ECHR 2015)". The national courts, instead, made a literal interpretation of the statement of the applicant, who explicitly accused the plaintiff of six crimes. The Court has advised the domestic judges to close their eyes to what was actually said and to interpret the applicant's words in another way. Yes, it could have been a declaration of collective political responsibility, maybe at another time and in another place, but it is more important to consider how the public understood the statement. And the public understood that the plaintiff had committed six crimes – in addition to engaging general political responsibility, which every ruling party usually assumes.

2. I should note that the notion of "crime" is not identical or even similar to political responsibility. It is clear for everyone. The word "crime" means one of the criminal-law offences and it cannot, in my view, be used as an exaggeration, a metaphor or a figurative, even virulent, expression of political responsibility. In turn, political responsibility means the public governance and/or consequences (not necessarily negative) of a government's public service. During the domestic proceedings the applicant emphasised that it had actually been a metaphor, and the judges did not accept that because of the concrete association with the word "crime". The applicant then explained that his speech (made at a meeting held to celebrate the anniversary of the Great October Revolution of 1917) had sought to publicly criticise the government for a violation of workers' rights resulting from an increase in prices, a drop in the quality of life and the unsatisfactory quality of the medical service. However, the applicant did not provide any evidence that the plaintiff (being a member of the federal parliament) had participated in any governmental decision. Instead, the applicant's lawyers believed that the burden to prove (that the plaintiff was not involved in anti-worker decisions) was shifted to the plaintiff. The explanation made by the applicant that his statement should be attributed to political responsibility, but not to crimes, was not accepted by the domestic court, which ordered the applicant to provide such explanation again to the public in order to refute his previous statement. The domestic court was mindful that the freedom of expression should be respected and it referred to the Universal Declaration of Human Rights, the International Covenant on Civil and

Political Rights and to the judgment in the case of *Colombani and Others v. France* (no. 51279/99, 25 June 2002). The Court has instead concluded that such interpretation would be enough without additional explanation to the public; however, the public would still believe that the plaintiff was a criminal. Therefore, the interpretation made by the Court of the impugned statement has put the domestic courts in an uncomfortable position.

3. The Court referred to the general principles concerning the margin of appreciation and the weighing up of the right to freedom of expression against the reputation of others as summarised in *Axel Springer AG v. Germany* ([GC], no. 39954/08, §§ 85-95, 7 February 2012). However, in paragraph 82 of that judgment the Court reiterated that the “freedom of expression carries with it “duties and responsibilities ... even with respect to matters of serious public concern”. These duties and responsibilities are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the “rights of others”. Thus, “special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals”. In the present case, the Court went beyond those limits saying that the form of political expression enjoyed a high level of protection under Article 10 of the Convention, since very strong reasons were required for justifying restrictions on political speech. In my view, the Court applied the general principles in the sense that the honour and dignity of a politician should be less protected than the honour and dignity of an ordinary person, and political expression enjoys a higher level of protection under Article 10.

4. This means that, according to the Court, the plaintiff as a politician (although an innocent person) should tolerate the applicant’s phrase “[t]he crimes are on them and can only be washed away with blood”, by which the applicant called for the arbitrary killing of political opponents including the plaintiff. I am not sure that the Court should support this practice or, as in the proposed draft, to close its eyes to the readiness to commit acts of violence. The domestic authorities, however, reacted to that expression of hate speech. The prosecutor issued a warning to the applicant to abstain from any incitement to revolution. The domestic court referred to the content of the statement when it evaluated the non-pecuniary damage incurred by the plaintiff.

5. I cannot accept the approach of the Court when it says that since there was no imminent threat of violence caused by the hate speech, then it should be protected under Article 10. It is undeniable that violence can often – and usually does – happen due to a cumulative effect and because hate speech does not allow for a rational debate on important public issues. I see that the task of the Court should be to facilitate a rational public debate as part of its judicial policy. The declaration made by the applicant remained far from rational debate.

6. There could be thousands of reasons for violence, and hate speech is usually only one of them. This applies to what has happened in many countries and what is happening at the moment in the USA. There was no violence in Russia because the communist party did not have strong support at the time of the impugned event, but if the applicant continues in the same way his statements will maintain a high level of tension and enmity in society. I cannot support the applicant due to the form of his expression and due to the substance of his anti-liberal speech against the reforms which ended with Russia's accession to the Convention in 1998.

7. The present case, in my view, was not decided in line with other similar cases of the Court regarding political expression. In the case of Judge Kudeshkina (*Kudeshkina v. Russia*, no. 29492/05, 26 February 2009), who had criticised the enormous powers of the chairpersons of the Russian courts, which undermined the independence of the judges, the Court stressed that her statement had been based on her personal experience (*ibid.*, § 94). In the case of *Morice* (cited above, and see paragraph 16 of the judgment) the accusations made by the applicant had been based on his assessment of factual circumstances. In the case of *Savva Terentyev v. Russia* (no. 10692/09, 28 August 2018) the applicant was convicted for inciting hatred and violence in respect of police officers; however, the Court explained that the applicant's comment was part of the debate, that it showed his emotional disapproval and rejection of what he saw as abuse of authority by the police. To the contrary, in the present case the applicant engaged in irresponsible hate speech against political opponents which was not based on any factual circumstances. That speech was presented by the Court as a discussion of the general political responsibility of the federal government. According to the judgment adopted by the majority, the plaintiff could be the subject of defamation and personal attack just because he is a politician and a member of the ruling party. Moreover, the plaintiff can hardly be said to be part of the government because in Russia the appointment of ministers is based on their management skills, rather than on their affiliation with the ruling party.

8. It would therefore be too strong to say that the national courts did not apply our standards because they did not address the political context of the case or the role of political parties. I am not aware of any case where it would be proposed to support such a manner of exercising the political function. In addition, I believe that such a form used by the applicant to criticise political opponents could be regarded as an action aimed at inciting hatred or enmity and it cannot be protected under Article 10. The Court's finding of a violation of Article 10 was based on the presumption that the domestic courts had failed to strike a balance between the need to protect the plaintiff's reputation and the applicant's right to freedom of expression. However, the Court cannot ignore the factual circumstances of the case which affect that balancing. In order to find a violation, the Court cannot

apply the Convention standards theoretically, but only in connection with the circumstances of the case. Finally, I would like to express my support for the analysis and conclusions made by my dear colleagues, Judges Serghides and Elósegui, in their separate opinions.

DISSENTING OPINION OF JUDGE ELÓSEGUI

1. I agree with all the arguments of my colleagues Judges Dedov and Serghides. For my part, I would like to reinforce the point that the domestic courts properly weighed in the balance the two rights involved, the right to freedom of expression (Article 10) and the right to the protection of one's honour and reputation (Article 8). We are dealing with a case of defamation in civil law. Mr Volodin brought a civil suit against Mr Rashkin, the applicant, for defamation. What the plaintiff claimed in the civil courts was that Mr Rashkin had accused him of committing a crime. In my opinion, dissenting from the majority in the Chamber, the Russian domestic courts reached the right conclusion, in weighing up the conflicting rights, namely that the insult proffered by Mr Rashkin against Mr Volodin was not covered by the protection of Article 10 of the Convention. In doing so, they applied the criteria of the Court's case-law. Now, the Court was called upon to scrutinise precisely the phrase related to this imputation of a crime. The applicant Mr Rashkin claimed that the Russian civil courts had not respected his freedom of expression and that the penalty he had received was incompatible with the European Convention on Human Rights.

2. The task for the Court in this concrete case has been to analyse whether freedom of expression covers insults without any factual basis or statements that are untrue. For the purpose of this analysis, I will apply the criteria established in the case of *Perinçek v. Switzerland* ([GC], no. 27510/08, ECHR 2015), in *Ringier Axel Springer Slovakia, a.s. v. Slovakia* (no. 41262/05, 26 July 2011) and in *Von Hannover v. Germany (no. 2)* ([GC], nos. 40660/08 and 60641/08, ECHR 2012). The Court has repeatedly emphasised the need to strike a fair balance between the rights enshrined in Article 8 and the freedom of expression in Article 10 of the Convention (see *Bédat v. Switzerland* [GC], no. 56925/08, 29 March 2016). Where the balancing exercise involving those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its own view for that of the domestic courts¹.

3. Accordingly, in order to see how the national courts have performed their analysis, I will use the following criteria. First, the context; secondly, the nature of the words; third, their potential to cause harm, in this case, to the reputation of the person to whom they are addressed, thus their impact; fourth, the reasoning of the domestic courts relating to the balancing exercise.

¹ See Prebensen, Søren, "The Margin of Appreciation and Articles 9, 10 and 11 of the Convention", in *Yearbook of the European Convention on Human Rights, Human Rights Law Journal*, Vol. 19, no. 1, 1998.

4. According to the applicant's statement, Mr Volodin had committed crimes (leaving aside the question of hate speech). The domestic courts looked at this as follows. First, the context. It was a public speech given by a politician, Mr Rashkin, aimed at another politician. Second, the nature of the words. The words were defamatory and insulting. They did not consist of any opinions which contributed to political pluralism or any criticism about ideas or different political approaches. They were expressed against a specific individual, calling him a criminal. Third, the potential to cause harm. They were directed at Mr Volodin and their impact was considerable, according to the Russian civil courts. The media covered that event and cited phrases from his speech. Mr Volodin is very well known in Saratov because he is the deputy of the State Duma of the Russian Federation. For the domestic courts such a statement could not be recognised as a form of open political discussion.

5. The reason for the domestic courts to perform a balancing exercise, taking into account the defamatory nature of the statement, is the following. Mr Volodin worked as senior teacher and acting associate professor from 1989 until 1992. He held a post of deputy in the Saratov City Council of People's Deputies of the Twenty-First Convocation for election constituency no. 176. Another important point is that the accusation against Mr Volodin was not based on any real facts. The courts concluded that Mr Rashkin had overstepped the limit of justified, rational and admissible political criticism by attributing to Mr Volodin the commission of crimes. He had done so knowingly and with intent (even though, in the civil courts intent does not have to be proven). Weighing up the different factors, they stressed, *inter alia*, that the said insults were completely unnecessary for the sort of political criticism which could be justified in the context of political speech. To call Mr Volodin a criminal had no connection with any political activity, but rather only had an offensive connotation and was purely an insult.

6. In my opinion, the Russian domestic courts successfully performed their balancing exercise in line with the case-law of our Court and the Court should respect the outcome². According to the Court's case-law, freedom of political speech does not cover lies told in order to discredit others, especially a political opponent. Political speech has its limits as the Court said recently in the case of *Pastörs v. Germany* (no. 55225/14, 3 October 2019). The Court has developed an enormous amount of case-law about defamation, but this has been ignored by the present judgment (see *Stomakhin v. Russia*, no. 52273/07, 9 May 2018; *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 2015³; *Palomo Sánchez and Others v. Spain* [GC],

² See Gerards, Janneke, *General Principles of the European Convention on Human Rights*, Cambridge, Cambridge University Press, 2019; Chapter 10 Justification of restrictions, III. Necessity, Proportionality and Fair Balance, pp. 229-258.

nos. 28955/06 and 3 others, ECHR 2011; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, ECHR 2007-IV; *Soares v. Portugal*, no. 79972/12, 21 June 2016; and *Almeida Leitão Bento Fernandes v. Portugal*, no. 25790/11, 12 March 2015). In all these cases, the Court respected the test of proportionality carried out by the domestic courts.

7. The Court has also repeatedly found that even though the limits of permissible criticism are wider as regards a politician than as regards a private individual, Article 10 of the Convention does not guarantee wholly unrestricted freedom of expression with respect to matters of serious public concern about political figures. A certain degree of exaggeration or provocation is allowed, but not to the extent of legitimating manifestly insulting language, or a gratuitous personal attack (contrast *Ivanović and DOO Daily Press v. Montenegro* (dec.), no. 24387/10, § 61, 5 June 2018, and see also the dissenting opinions of Judges Wojtyczek and Kūris in *Ziemiński v. Poland* (no. 2), no. 1799/07, 5 July 2016).

8. In the instant case, the Court did not take account of the factual basis established by the domestic courts, which noted the existence of insulting expressions pronounced by the applicant in a public speech, without the presence of the targeted person, who was thus unable to defend himself (see, as to the factual basis, *Lindon, Otchakovsky-Laurens and July*, cited above). Furthermore, the domestic courts, invoking the Court’s case-law, carried out a thorough assessment of the circumstances. As said above, several factors were stressed in reaching the reasonable conclusion that the actions of the applicant amounted to a gratuitous personal attack that went beyond harsh political criticism (see *Alithia Publishing Company Ltd and Constantinides v. Cyprus*, no. 17550/03, § 49, 22 May 2008). The expressions had a clear insulting content, and had no actual connection with the plaintiff’s political party. Moreover, regarding the severity of the consequences, the proportionality of the imposed pecuniary sanction was carefully considered by the domestic courts, and it is noteworthy that no criminal sanction has been imposed, but a mere civil award of compensation.

9. In conclusion, defamation must not be protected by Article 10 of the Convention. In relation to the case of *Palomo Sánchez and Others* (cited above, § 67), the Steering Committee for Human Rights (CDDH) has commented, in its *Analysis of the relevant jurisprudence of the European Court of Human Rights and other Council of Europe instruments to provide additional guidance on how to reconcile freedom of expression with other rights and freedoms, in particular in culturally diverse societies* (CDDH(2017)R87 Addendum III, Strasbourg, 13 July 2017, (as adopted by the CDDH at its 87th meeting, 6-9 June 2017), pp. 12-13), as follows:

³ See Alexy, Robert, “The Responsibility of Internet Portal Providers for Readers Comments. Argumentation and Balancing in the Case of *Delfi AS. v. Estonia*”, in M. Elósegui, I. Motoc and A. Miron, *The Rule of Law*, Springer 2020, in press.

“Distinction must also be made between criticism and insult. In the case *Palomo Sánchez and Others v. Spain* the Court analysed the difference between these two concepts in the context of the application of six employees of a private company who had been dismissed because of the publication in a newsletter of a cartoon and two articles with offensive, injurious and vexatious content against other employees. The Court held that insulting language may, in principle, justify an appropriate sanction, which would not constitute a violation of Article 10 of the Convention when the limits of acceptable criticism are overstepped. When language amounts to wanton denigration and its sole intent is to insult, it falls outside the protection of Article 10 of the Convention.”

10. There are also a considerable number of cases – completely overlooked in the judgment – related to the damaging of a person’s reputation, honour and dignity, where the Court has found that such conduct is not covered by the right to freedom of speech, for example when an individual is insulted by being called a “thief” without any factual basis (see *Vitrenko and Others v. Ukraine* (dec.), no. 23510/02, 16 December 2008). By contrast, the Court has protected the freedom of speech of journalists in many Russian cases when they had criticised corruption by politicians with a factual basis (see *Mazepa and Others v. Russia*, no. 15086/07, 17 July 2018, where the applicant was the mother of the journalist Anna Politkovskaya). I have voted myself in favour of many of these violations (see, for example, *Skudayeva v. Russia*, no. 24014/07, 5 March 2019; *Novaya Gazeta and Milashina v. Russia*, Committee, no. 4097/06, 2 July 2019; *Nadtoka v. Russia* (no. 2), no. 29097/08, 8 October 2019; *Bychkov v. Russia*, no. 48741/11, 8 October 2019; *Savva Terentyev v. Russia*, no. 10692/09, 28 August 2018; and *Pirogov v. Russia*, Committee, no. 27474/08, October 2019).

11. It is not a matter of applying a different criterion to politicians. That is why the Court’s answer to the question raised by the parties, namely whether there has been a violation of Article 10 of the Convention, for me should be in the negative; in my view there has not been a violation. Moreover, in response to the question whether the domestic courts applied standards that were in conformity with the principles embodied in Article 10 of the Convention, my answer will be that they did (See *Keller v. Hungary* (dec.), no. 33352/02, 4 April 2006).

12. I cannot share the criteria established by the majority in paragraph 15 of the present case:

“The applicant’s procedural adversary, Mr Volodin was also a member of parliament, but elected from the governing party. As a career politician who inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, he should be prepared to display a greater degree of tolerance and accept wider limits to criticism. The requirements of the protection of a politician’s reputation had to be weighed against the interests of open discussion of political issues”.

13. First, it is for the domestic courts to say that, not for the Court; secondly, even as a judge of this Court, I do not see here any open

discussion of political issues. I think that the case warrants referral to the Grand Chamber to clarify the criteria in relation to insults between politicians, as has been said about hate speech (see *Féret v. Belgium*, no. 15615/07, 16 July 2009)⁴. It is not a good argument to allow some politicians to insult others merely because, as the Chamber has said; “The Court notes that he was a member of parliament from an opposition party” (paragraph 14). In my view one of the values of the Convention is to defend democracy and political pluralism, but even though statements by members of parliament constitute political speech *par excellence*, for me it goes beyond the protection of the Convention to say:

“The crimes are on them and can only be washed away with blood. With blood they should wash away the disgrace they have brought upon us”.

Being in total agreement with the dissenting opinion of Judge Dedov, I cannot share the assessment that the majority have made of Mr Rashkin’s words, to the effect that “his statement thus constituted a declaration of a collective political responsibility rather than an accusation of specific criminal-law offences” (paragraph 16).

14. The Convention has to protect democratic values, among them that of rational political debate. To seek protection under the Convention for this kind of expression used by the applicant is an abuse of rights, under Article 17 of the Convention. For me the reasoning given by the Court in the case of *Pastörs* (cited above), could have been perfectly applied in the present case. *Pastörs* was also a politician. In that judgment it is said:

“The Court considers that the applicant sought to use his right to freedom of expression with the aim of promoting ideas contrary to the text and spirit of the Convention. This weighs heavily in the assessment of the necessity of the interference (see *Perinçek*, cited above, §§ 209-12, and *Pastörs*, cited above, § 46).”

Moreover, in the *Pastörs* judgment the Court made many points which could be applicable to the present case of *Rashkin* such as: “That finding by the domestic courts was based on an assessment of the facts with which the Court can agree” (ibid., § 44); “The Courts considers that the gist of the Regional Court’s reasoning was threefold” (ibid., § 45); “The Court attaches fundamental importance to the fact that the applicant planned his speech in advance, deliberately choosing his words” (ibid., § 46); “In the present case, the applicant intentionally stated untruths ...” (ibid., § 47).

15. By way of comparison, in the *Pastörs* case the Court found that “the applicant’s impugned statements [had] affected the dignity of the Jews to the point that they justified a criminal-law response”. In the present case, we are talking about civil proceedings for defamation of a specific person, but I wonder myself why the standards have to be different? Is it merely

⁴ Voorhoof, Dirk, “No overbroad suppression of extremist opinions and ‘hate speech’”, Strasbourg Observers, Human Rights Centre, Ghent University and Legal Human Academy, 12 June 2018.

because the target is a person who is a politician? Moreover, what Mr Rashkin was defending was to launch a new “Bolshevik Revolution”⁵. Even if this discourse is covered by political freedom – yet it was not the question brought to the Russian national civil courts and the Communist party is an official one – the Court has been criticised many times in academia for having two different standards of protection, one related to national-socialism and another related to the past soviet antidemocratic communist era⁶. It is surprising that the Chamber has not taken into account any of the analysis of the context provided by the national judge Dmitry Dedov, who has better knowledge of the social and political context.

16. The penalty could be considered excessive but Mr Rashkin knew what he was doing and as he made a provocative statement he has to assume the consequences. I am prepared to admit that the quantum is high, but there have been similar cases in the Russian courts. A similar sanction was seen, for instance, in two Chamber cases against Portugal (even worse because they were criminal cases, with a prison sentence changed to a pecuniary sanction plus damages awarded to the victims; see *Soares*, cited above, and *Almeida Leitao Bento Fernandes*, cited above). Even in the latter case, the compensation to the persons harmed was of 53,000 euros. That was only for a novel with 100 copies. Moreover, although the situation was not related to politicians, I have cited these two cases in order to show that in many countries the quantum of civil liability related to defamation and the impugning of honour tends to be quite high.

17. I would like to finish my dissenting opinion by mentioning Robert Schuman, Alcide de Gasperi, Konrad Adenauer and Jean Monnet. They were all politicians who defended democracy, focussing their objective on the search for solutions to injustices in a climate of dialogue. They were brilliant men, with pioneering minds and a clear view of the necessity of understanding between different political approaches, defending high-quality political debate based upon a search for harmony and concord. Such debate runs counter to the use of violence by words or deeds.

⁵ See Richter, Andrei, “The Relationship between Freedom of Expression and the Ban on Propaganda for War”, in Wolfgang Benedek, Florence Benôit-Rohmer, Matthias C. Kettmann, Benjamin Kneihls and Manfred Nowak, *European Yearbook on Human Rights 2015*, 7th Edition, Belgium and Austria, Intersentia, 2015, pp. 489-503. In p. 501: “In other words, using the right to freedom of expression for ends which were contrary to the text and spirit of the Convention is not protected by the ECHR”.

⁶ See Belavusau, Uladzislau, “Memory laws and freedom of speech: Governance of history in European law”, in Belavusau, U. and Gliszczynska-grabias, A. (eds), *Law and Memory: Towards Legal Governance of History*, Cambridge, Cambridge University Press, 2017, pp. 535-548. doi: 10.1017/9781316986172, p. 547. See also Cheema, Moeen and Kamran, Adeel, “The Fundamentalism of Liberal Rights: Decoding the Freedom of Expression under the European Convention for the Protection of Human Rights and Fundamental Freedoms”, *Loyola University Chicago International Law Review* 79, Spring/Summer, (2014), pp. 79-100. Available at: <http://ssrn.com/AuthorID=1137698>, 2292346 and <http://ssrn.com/abstract=2499332>.

Although they were the founders of the subsequent European Union, I believe that the Convention was drafted in the same spirit. Thus, to pretend that the Convention gives protection to insults, defamation or lies in contemporary society strays very far from the spirit of the Convention and its democratic values. On the contrary, in the political arena, sound argument and good oratory are to be expected. Moreover, in this era of “fake news”, citizens deserve to be properly informed and treated as rational beings.