THIRD SECTION

CASE OF KOMMERSANT AND OTHERS v. RUSSIA

(Applications nos. 37482/10 and 37486/10)

JUDGMENT

STRASBOURG

23 June 2020

*This judgment is final but it may be subject to editorial revision.*

In the case of Kommersant and Others v. Russia,

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

 Helen Keller, *President,* María Elósegui, Ana Maria Guerra Martins, *judges,*
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the applications (nos. 37482/10 and 37486/10) 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 the Kommersant publishing house and two Russian nationals, Ms Maria‑Luiza Urmasovna Tirmaste and Mr Boris Yefimovich Nemtsov (“the applicants”), on 22 June 2010;

the decision to give notice to the Russian Government (“the Government”) of the complaints concerning the right to freedom of expression and to declare inadmissible the remainder of the applications;

the parties’ observations;

the decision to reject the Government’s objection to examination of the applications by a Committee;

Having deliberated in private on 2 June 2020,

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

INTRODUCTION

The case concerns the finding of the applicants’ liability in defamation after one of them published a report on corruption in the Moscow mayor’s office.

1. THE FACTS

1.  The first applicant, a joint-stock company incorporated under Russian law, is the publisher of the *Kommersant* newspaper. The second applicant, Ms Tirmaste, was born in 1978 and lives in Moscow. She was a journalist writing for the *Kommersant* newspaper. The third applicant, Mr Nemtsov, was born in 1959. He had been the governor of a Russian region and a Government minister before becoming an opposition politician. The applicants were represented by Mr D. Zharkov, Mr V. Prokhorov and Ms O. Mikhaylova, lawyers practising in Moscow and the Moscow Region.

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

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

4.  In 2009, in time for the election to the Moscow City Council, Mr Nemtsov released a research report “Luzhkov: Results” which took stock of the seventeen-year-long rule of the Moscow mayor Mr Luzhkov. The forty-page dossier detailed widespread corruption in Moscow, drawing on sociological data, publications in the Russian and foreign media, expert opinions and other sources, all of which were listed in the annex to the report. It concluded:

“Corruption in Moscow is not just problematic, it is systemic. It is an open secret for many Muscovites that corruption has permeated all levels of officialdom in Moscow. It is obvious to us that Luzhkov and his wife have set a harmful example. In the past ten years alone, Luzhkov has signed dozens of orders authorising his wife to start construction work on more than 1,300 ha of land in Moscow. In addition, the Moscow Government approved the privatisation of ... the largest manufacturer of prefabricated houses in Moscow. The privatisation resulted in [Luzkhov’s wife] gaining control over approximately 20% of the Moscow housing market ... [She] has become the only Russian woman having a personal fortune in excess of one billion dollars. Pursuant to Article 34 of the Family Code, property which is acquired by one spouse is owned jointly with the other spouse. This means that Luzhkov, during his years as mayor, has become a dollar billionaire, just like his wife.”

5.  On 17 September 2009 the *Kommersant* newspaper published a piece by Ms Tirmaste under the headline “Moscow mayor ready to sue Boris Nemtsov. Opposition politician to be called to account for the ‘Luzhkov: Results’report”. The publication stated that the Moscow mayor would bring several defamation claims against Mr Nemtsov. Ms Tirmaste approached the mayor’s spokesperson Mr Ts. for comment. Mr Ts. stated that Mr Luzhkov and Mr Nemtsov were “men of a different calibre”:

“How could they be compared? Luzhkov is a well-known figure while Nemtsov is a non-entity. Even from a distance of a thousand kilometres he would not measure up to the mayor.”

The article went on to quote Mr Nemtsov’s reply to the spokesman’s comment:

“I fully agree with Mr [Ts.] that Luzhkov and I are men of a different calibre: I consider that Luzhkov is a corruptionist and a thief while I am neither!”

6.  On 7 October 2009 the Moscow Government and Mayor Luzhkov sued the applicants for defamation. They challenged various statements in the report, including the first three sentences quoted in paragraph 4 above. Mr Luzhkov also claimed that Mr Nemtsov’s description of him as a “corruptionist and thief” had been untrue and damaging to his reputation.

7.  On 30 November 2009 the Zamoskvoretskiy District Court in Moscow granted the defamation claim in part. It found that a number of statements in the text of the report did not concern Mr Luzhkov or imply that he had committed any wrongful acts. By contrast, the court found, with regard to the second and third sentences of the second paragraph of the report’s conclusions (“It is an open secret ... a harmful example”), that they had injured the honour and dignity of the Moscow Mayor and the business reputation of the Moscow Government:

“... they contain allegations that the complainants acted contrary to the norms of law and morals, and used their official position to harm the lawful interests of society and the State ... The information created the impression that the activities of the Moscow Government under the leadership of Mr Luzhkov had brought about widespread corruption in all spheres of city life ... [These phrases] ... contain allegations of a crime ... and the word ‘harmful’ means ‘wicked, pernicious’.”

8.  As to Mr Nemtsov’s reaction to Mr Ts.’s comment, the court held:

“the statement ... reflects Mr Nemtsov’s judgment (*суждение*) which undermines Mr Luzhkov’s honour, dignity and business reputation and is insulting.”

9.  Referring to the “factual elements of the case, the contents of publications, and the scope of dissemination of untrue information”, the court awarded Mr Luzhkov 500,000 Russian roubles (RUB, 11,430 euros at the material time) in respect of non-pecuniary damage, from each of Mr Nemtsov and the Kommersant publishing house, and also required them to publish a rectification.

10.  On 9 February 2010 the Moscow City Court rejected appeals by all parties to the proceedings and upheld the findings of the District Court in a summary fashion.

11.  On 2 March 2010 Mr Nemtsov paid RUB 13,650 for publishing a rectification. On 13 April 2010 he paid the amount awarded to Mr Luzhkov.

1. THE LAW
	1. JOINDER OF THE APPLICATIONS

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

* 1. STANDING OF MR NEMTSOV’S DAUGHTER TO CONTINUE THE PROCEEDINGS

13.  On 27 February 2015 Mr Nemtsov was assassinated in Moscow. His daughter, Ms Zhanna Borisovna Nemtsova, informed the Court of her wish to pursue the proceedings in his stead.

14.  The Court considers that Mr Nemtsov’s daughter has a legitimate interest in obtaining a ruling that the finding whether her late father’s liability in defamation constituted a breach of his right to freedom of expression (see *Dalban v. Romania* [GC], no. 28114/95, § 39, ECHR 1999‑VI). Accordingly, it holds that Ms Nemtsova has standing to continue the present proceedings in Mr Nemtsov’s stead.

* 1. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

15.  The applicants complained that the judgments in the defamation claim and an excessive amount of the award had violated their right to freedom of expression under 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...

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 ...”

* + 1. Admissibility

16.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

* + 1. Merits

17.  The Government submitted that the complaint by Ms Tirmaste was manifestly ill-founded because she had not been required to pay any damages or publish a rectification. Mr Nemtsov’s statements had not been founded on verified or verifiable information and had been capable of causing actual damage to the mayor’s standing, undermining his professional integrity or qualification in the eyes of the public. Mr Nemtsov had actually accused the Moscow mayor of criminal offences under Articles 290 (bribery) or 201 (abuse of position in a commercial or other organisation) of the Criminal Code. The Government drew parallels between the present case and the Court’s inadmissibility decision in the case of *Vitrenko and Others v. Ukraine* (dec.)(no. 23510/02, 16 December 2008), in which one of the applicants had called her political rival a thief without justification. As to the proportionality of the award, the Government cited five domestic judgments in defamation cases in which the awards had ranged from RUB 270,000 to 4,000,000. In their view, those judgments indicated that the award in the present case had not been exceptional or excessive. They also referred to the Court’s judgments in cases in which comparable amounts had been awarded but the Court had not found a violation of Article 10.

18.  The applicants emphasised the pre-election context in which Mr Nemtsov had released the report exposing corruption and misappropriation of funds in the Moscow Government and the mayor’s favouritism towards his wife’s property development business. The facts in the report had justified the conclusions which Mr Nemtsov had drawn from them. That the facts had not been yet the subject of an official investigation did not mean that they were untrue or inaccurate. Just a few months after the end of the defamation proceedings the President of Russia dismissed Mr Luzhkov from his position for a loss of confidence. The conclusions were introduced by phrases, such as “it is an open secret” or “it is obvious to us”, which indicated that they represented Mr Nemstov’s opinion and were not amenable to proof. The courts did not take into account Mr Luzhkov’s position of a professional politician who should have been more tolerant of criticism. As to Mr Nemtsov’s spontaneous reaction to a provocative comment by the mayor’s spokesperson, the applicants considered that he was entitled to a degree of exaggeration. The courts acknowledged that the response was his “judgment” rather than a factual allegation but nevertheless held him responsible for the failure to establish its truth. Finally, the applicants submitted that the amount awarded to Mr Luzhkov had been many times larger than the awards in similar proceedings. Such a large award had been intended to stifle criticism of the Moscow government.

19.  The Court finds that the finding of the applicants’ liability in defamation and the award of damages against Mr Nemtsov and the Kommersant publishing house constituted interference with their right to freedom of expression. As to the Government’s argument that there was no interference with Ms Tirmaste’s rights because she had not been required to pay any damages, the Court has consistently rejected similar objections. It has held a violation is conceivable even in the absence of any pecuniary detriment, the latter being relevant only in the context of Article 41. Even where no award of damages has been made against the applicant, the finding of liability in the defamation proceedings may have a chilling effect on the exercise of the right to freedom of expression and may discourage him or her from publishing critical materials on matters of public interest (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 26, Series A no. 313, and *a/s Diena and Ozoliņš v. Latvia*, no. 16657/03, §§ 58-60, 12 July 2007).

20.  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. 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”.

21.  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)). The following elements need to be taken into account: the position of the applicants, the position of the person against whom the criticism was directed, the subject matter of the publication, the characterisation of the contested statement by the domestic courts, the wording used by the applicants, and the penalty imposed (see *Krasulya v. Russia*, no. 12365/03, § 35, 22 February 2007).

22.  The statements which gave rise to the defamation claim in the present case were made by Mr Nemtsov, an opposition politician. Mr Nemtsov had published a research report which alleged, in particular, that, during more than seventeen years in power, the Moscow mayor had helped his wife, the billionaire property developer, to become the richest woman in Russia. Mr Nemtsov concluded that systemic corruption at all levels of the Moscow government had been spearheaded by the Moscow mayor and his wife. The second statement which the courts held to be defamatory was Mr Nemtsov’s reaction to the comment by the mayor’s spokesman who had described him as a “non-entity” unable to “measure up to the mayor”. Mr Nemstov quipped that he should not indeed be compared to Mr Luzhkov who, unlike him, was a “corruptionist” and a “thief”.

23.  Mr Nemtsov published the dossier accusing the mayor of corruption in advance of the forthcoming election for the new city council in Moscow, in which the mayor stood as the top candidate for the ruling United Russia party. The issues in the report were matters of intense public interest for Moscow residents and could have swayed their voting intentions. The Court reiterates that free elections and freedom of expression together form the bedrock of any democratic system. The two rights are inter-related and operate to reinforce each other, as freedom of expression is one of the “conditions” necessary to “ensure the free expression of the opinion of the people in the choice of the legislature”. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely. This principle applies equally to national and local elections (see *Kwiecień v. Poland*, no. 51744/99, § 48, ECHR 2007-I). As a general rule, any opinions and information pertinent to elections which are disseminated during the electoral campaign should be considered as forming part of a debate on questions of public interest. Statements made as part of an election campaign are accorded the high level of protection under Article 10, leaving the State authorities a particularly narrow margin of appreciation for suppressing such speech (see *Morice v. France* [GC], no. 29369/10, § 125, ECHR 2015).

24.  When considering the defamation claim, the domestic courts did not heed the electoral context in which the impugned statements had been made or acknowledge the parties’ role as political actors. They did not note that, as a professional politician and the elected head of the city government, the mayor inevitably and knowingly laid himself open to close scrutiny of his every word and deed. The requirements of the protection of his reputation had to be weighed against the interests of open discussion of political issues. The courts’ decisions were confined to the assessment of damage which the mayor’s reputation may have suffered in connection with Mr Nemtsov’s remarks and the lack of substantiation of what they considered to be factual allegations of criminal conduct. They failed to recognise that the instant case was one where the margin of appreciation available to the authorities in establishing the necessity for the impugned measure was particularly narrow. 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 failed to “apply standards which were in conformity with the principles embodied in Article 10” (see *Terentyev v. Russia*, no. 25147/09, § 24, 26 January 2017).

25.  As regards the form and contents of Mr Nemtsov’s statements, the domestic courts failed to consider his allegations of widespread corruption in the Moscow Government in the light of the factual information contained in the report as a whole. The statement accusing Mr Luzhkov and his wife of setting a “harmful example” of corrupt practices was followed with concrete examples of such practices, including the mayor’s orders allocating a large swathe of land for development by his wife’s company or transferring a State-owned manufacturer of prefabricated housing into her company’s ownership (see paragraph 4 above). These factual elements were not disputed in the proceedings; the plaintiffs did not challenge them. In the Court’s view, those undisputed elements lent support to the conclusion which Mr Nemtsov drew from them. In so far as he also quoted as saying that he considered Mr Luzhkov to be a “corruptionist” and a “thief”, the Court acknowledges that these are strong words which suggest involvement in criminal activities (see *Vitrenko and Others,* cited above). However, the absence of a criminal conviction does not necessarily exclude the reality of the alleged facts, in particular, where such allegations have not yet been officially investigated (see *Nadtoka v. Russia*, no. 38010/05, § 45, 31 May 2016; see also *Fedchenko v. Russia (no. 4)*, no. 17221/13, § 47, 2 October 2018, and *Marian Maciejewski* *v. Poland*, no. 34447/05, §§ 72‑76, 13 January 2015, in which the applicants’ use of the words like “thieves” was found, in the circumstances, not to have overstepped the margins of exaggeration or even provocation covered by freedom of expression). Mr Nemstov was reacting to a rather offensive comment by the mayor’s spokesman, and his reaction was reported as is, without editing. Spontaneous forms of expression allow for a greater degree of exaggeration and cannot be held to the same standard of accuracy as written assertions (compare *Fuentes Bobo v. Spain*, no. 39293/98, § 46, 29 February 2000, and *Ottan v. France*, no. 41841/12, § 69, 19 April 2018).

26.  As regards the Kommersant publishing house and journalist Ms Tirmaste, the finding of their liability in defamation did not relate to their own speech but solely to the reported comment by Mr Nemtsov. The Court reiterates its constant approach that an individual’s liability in defamation must not extend beyond his or her own words. Punishing a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so (see *Reznik v. Russia*, no. 4977/05, § 45, 4 April 2013, and *Stojanović v. Croatia*, no. 23160/09, §§ 39 and 70, 19 September 2013). The Russian courts did not give relevant and sufficient reasons for holding the applicants responsible for the statements which had been quoted directly from their identified author.

27.  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 *Kasabova v. Bulgaria*, no. 22385/03, § 71, 19 April 2011). Mr Luzhkov was awarded a total of RUB 1,000,000 in respect of non-pecuniary damage, that is to say, almost EUR 23,000 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). The Government were able to identify only five domestic cases in which comparable or higher awards had been made.

28.  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 be “necessary in a democratic society” in the sense that it must bear a reasonable relationship of proportionality to the injury to reputation suffered (see *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, §§ 48-51, Series A no. 316‑B). However, when making the pecuniary award against the applicants, the District Court merely stated a few generalities, such as “factual elements of the case” or “contents of publications” (see paragraph 9 above). It did not give a specific justification for granting such a large amount in damages or carry out a serious assessment of its proportionality (compare *Kwiecień*, cited above, § 56). In these circumstances, the Court finds that a high award of damages to Mr Luzhkov 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).

29.  Having regard to the Russian courts’ failure to apply the principles embodied in Article 10 of the Convention and an excessive amount of the award against two applicants, the Court finds a violation of that provision.

* 1. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30.  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.”

31.  Ms Nemtsova claimed 12,994 euros (EUR) in respect of pecuniary damage, representing the award Mr Nemtsov had paid to the Moscow mayor plus the fee for publishing the rectification, as converted at the official exchange rate on the date of the claims. She also claimed EUR 50,000 in respect of non‑pecuniary damage. The other applicants did not submit a claim for just satisfaction.

32.  The Government submitted that the claim was unfounded and excessive.

33.  The Court awards Ms Nemtsova, in her capacity of Mr Nemtsov’s heir, the amount claimed in respect of pecuniary damage and EUR 7,800 in respect of non-pecuniary damage, plus any tax that may be chargeable.

34.  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.

1. FOR THESE REASONS, THE COURT, UNANIMOUSLY,
2. *Decides* to join the applications;
3. *Decides* that Ms Nemtsova has standing to continue the present proceedings in Mr Nemtsov’s stead;
4. *Declares* the case admissible;
5. *Holds* that there has been a violation of Article 10 of the Convention;
6. *Holds*
	1. that the respondent State is to pay Ms Zhanna Borisovna Nemtsova, within three months, the following amounts,to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
		1. EUR 12,994 (twelve thousand nine hundred and ninety-four euros), plus any tax that may be chargeable, in respect of pecuniary damage;
		2. EUR 7,800 (seven thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
	2. 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* the remainder of the claim for just satisfaction.

Done in English, and notified in writing on 23 June 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova Helen Keller
 Deputy Registrar President