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

FOURTH SECTION

CASE OF KOMMERSANT MOLDOVY v. MOLDOVA

(Application no. 41827/02)

JUDGMENT

STRASBOURG

9 January 2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kommersant Moldovy v. Moldova,

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

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr G. BONELLO,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr J. ŠIKUTA, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,
Having deliberated in private on 5 December 2006,

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

PROCEDURE

1. The case originated in an application (no. 41827/02) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a company registered in Moldova, Kommersant Moldovy ("the applicant"), on 17 October 2002.

2. The applicant was represented by Mr V. Nagacevschi and Mr P. Midrigan, lawyers practising in Chişinău. The Moldovan Government ("the Government") were represented by their Agent, Mr V. Pârlog.

3. The applicant alleged that the closure of its homonym newspaper amounted to a violation of Article 10 of the Convention and that as a result its right to enjoy its property was violated, contrary to Article 1 of Protocol No. 1 to the Convention.

4. The application was allocated to the Fourth Section of the Court. On 13 June 2005 the President of the Section decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it was decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant newspaper published a series of articles in June-September 2001, criticising the authorities of Moldova for their actions in

respect of the break-away region of Moldova ("Moldavian Republic of Transdniestria" or "MRT", see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-...) and reproducing harsh criticism of the Moldovan Government by certain MRT and Russian leaders.

6. The applicant published the articles under the following headlines:

> "The State Duma of the Russian Federation has annexed Moldova and [MRT] to the Union of Russia and Belarus", "There shall be no meeting...", "The Russian Ministry of Foreign Affairs acknowledged that the withdrawal of Russian troops from [MRT] may affect stability in the region", "That's why NATO is what it is, or a holy place is never empty", "The black list", "A Nobel Prize for the leader", "If the person disappears, there will be no problem?", "So is it a blockade or WTO conditions?", "One does not choose one's neighbours", "[MRT] is much closer to WTO conditions than Moldova" and "Mission impossible".

7. In these articles, the applicant reproduced, literally or in a summary, or commented upon declarations by Moldovan, Russian and MRT authorities in respect of the negotiation process between Moldova and MRT, as well as economic, (geo-)political, social and other issues. In a number of these articles the actions and declarations of high-ranking Moldovan officials were harshly criticised. The applicant emphasised, however, that it did not call for any violent or unlawful act and, in the impugned articles, expressly qualified such expressions as "to annihilate" ("*убрать*") as meaning "political annihilation [of MRT leader]".

8. On 5 November 2001 the Prosecutor General of Moldova initiated court proceedings against the applicant in the Economic Court of Moldova. The applicant was accused of "endangering, through its publications, national security and territorial integrity together with public safety and order in Moldova", by "lending open support to the unconstitutional regime of the self-proclaimed [MRT], promoting the separatist ideas expressed by its leaders and misrepresenting the essence of legal actions of Moldovan authorities and international organisations in solving the problems of the regions to the East of the Dniester". The Prosecutor General illustrated his request with two examples of phrases from the impugned articles, namely:

> "The lack of legal balance between the [MRT] and the Republic of Moldova, as a recognised State, allows the latter to approach the negotiations from a position of superiority and dictatorship, which is the main reason for the slow pace of the negotiation process"; "In the circumstances of an ongoing political, diplomatic and economic blockade of MRT by the Republic of Moldova we consider impossible a meeting between the Presidents of MRT and the Republic of Moldova".

Since the applicant's publications, while formally presented as an exercise of the right to inform the public, were contrary to Article 32 of the Constitution and Article 4 of the Press Act (see below) and the applicant had been warned against continuing to violate the law, the court was requested to order the closure of the newspaper.

9. On 30 November 2001 the Economic Court of Moldova accepted the claims of the Prosecutor General and ordered the closure of the newspaper.

The court recalled the submissions of the parties and cited the applicable domestic law. It referred in its judgment to the headlines listed in paragraph 7 above and stated that it considered the articles to have:

> "exceeded the limits of publicity set out in Article 4 of the Press Act and endangered the territorial integrity of Moldova, national security and public safety and created the potential for disorder and crime, violating Article 32 of the Constitution."

The court also stated that systematic violations of the Press Act could be sanctioned with the closure of a newspaper under Article 7 of the same Act (see below).

10. In response to the applicant's arguments the court found that:

> "Article 10 of [the Convention] provides for freedom of expression ... (§1) but the exercise of this freedom carries with it duties and responsibilities, and may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law (§2)".

11. The court did not specify which expression or phrase constituted a threat and gave no further detail. It added that the articles did not represent a fair summary of public statements by public authorities and thus could not be immune from liability under Article 27 of the Press Act (see paragraph 17 below). The court found that the Prosecutor General had contacted the publisher before initiating the proceedings, as required by law. The applicant was ordered to pay court fees of 180 Moldovan lei.

12. The applicant appealed, arguing that it had simply informed the public about current events and about the Government's attitude and actions towards the authorities of the MRT. It relied on Article 32 of the Constitution, Article 4 of the Press Act and Article 10 of the Convention.

13. On 5 February 2002 the Appellate Chamber of the Economic Court of Moldova upheld that judgment, repeating the arguments of the lower court. The court found, *inter alia*, that:

> "the lower court correctly assessed the facts and rejected the [applicant's] objections. ... It was correctly decided that no violation of Article 10 of the Convention had been committed, since although that Article provides for the right to freedom of expression, it carries with it duties and responsibilities and its exercise is subject to such formalities, conditions, restrictions or penalties as are prescribed by law".

The court rejected the applicant's submission that the economic courts were not competent to examine a freedom of expression case since it had been registered as a joint-stock company. It also rejected the submission that the Prosecutor General had not followed the proper pre-trial procedure and was not competent to initiate the relevant proceedings.

14. On 29 May 2002 the Supreme Court of Justice upheld the two judgments. It also essentially repeated the reasoning of the Economic Court and found that the applicant:

> "has exceeded the limits of restrictions on freedom of expression, determined in Article 4 of the Press Act, through some of the publications annexed to the file which

undermine national security, territorial integrity and public safety, the protection of order and the prevention of crime".

15. The newspaper was subsequently re-registered under the name "Kommersant-Plus".

II. RELEVANT DOMESTIC LAW

16. Article 32 of the Constitution reads as follows:

"Article 32 Freedom of opinion and of expression

(1) Each citizen is guaranteed freedom of thought, of opinion, as well as freedom of expression in public through words, images or through other available means.

(2) Freedom of expression shall not harm the honour or dignity of others or the right of others to have their own opinion.

(3) The law prohibits and punishes the contestation and defamation of the State and the nation, calls to war and aggression, national, racial or religious hatred, and incitement to discrimination, territorial separatism, or public violence, as well as other expression which endangers the constitutional order."

17. The relevant provisions of the Press Act of 26 October 1994 (Law no. 243-XIII) read as follows:

"Article 4.

Publishers of periodicals ... shall have a discretion as to the documents and information they choose to publish, but shall have regard to the fact that, since it carries with it duties and responsibilities, the exercise of these freedoms is 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.

Article 7

... (4) The court shall adopt a decision to end the activity of a newspaper or a news agency in the case of systematic violation of the present Act.

Article 27

The founders, publishers and journalists shall not be held responsible for imparting information, if it:

a) is part of official documents and statements of the public authorities; or

b) textually reproduce public statements or fairly summarise them"

THE LAW

I. ADMISSIBILITY OF THE COMPLAINTS

18. The applicant complained, under Article 10 of the Convention and Article 1 of Protocol No. 1, about the closure of its newspaper.

19. The Court considers that the applicant's complaints under Article 10 of the Convention and Article 1 of Protocol No. 1 raise questions of law which are sufficiently serious that their determination should depend on an examination of the merits, and no other grounds for declaring them inadmissible have been established. The Court therefore declares these complaints admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 4 above), the Court will immediately consider the merits of these complaints.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

20. The applicant complained that by ordering the closure of the newspaper as a result of its publications, without giving sufficient reasons, the domestic courts had violated its right to freedom of expression.

It relied on Article 10 of the Convention, which provides 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, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The arguments of the parties

1. The Government

21. The Government accepted that the closure of the newspaper constituted an interference with the applicant's freedom of expression but submitted that it was "provided for by law", pursued a legitimate aim under Article 10 § 2 and was "necessary in a democratic society".

22. The Government identified the same phrases in the impugned articles as those mentioned in paragraph 8 above which proved, in their opinion, the need to sanction the newspaper. They also referred to the following additional phrases:

> "... but here is Voronin using this word [nation], claiming to represent its opinion, without caring, at the same time, about that nation"; "One may clearly observe Vladimir Voronin's wish to resolve [MRT's] fate without the participation of its representatives" and "Voronin has the psychology of a party-Godfather (*партийный бонз*)".

23. In particular, they submitted that the prohibition of incitement to territorial secessionism and to acts affecting the constitutional order was expressly included in Article 32 of the Constitution and Article 4 of the Press Act (see paragraphs 12 and 13 above). The sanction against the applicant pursued the legitimate aim of protecting the national security and territorial integrity of the Republic of Moldova and of protecting the reputation of the President of Moldova and of the entire country against defamation.

24. The interference was "necessary in a democratic society" because there was a "pressing social need" to protect the territorial integrity of the State and national security and because the courts gave "relevant and sufficient reasons" for their decisions, considering the difficult relationship between the Moldovan authorities and those of the MRT. The phrases identified by the Government (see paragraph 22 above) constituted, in their view, a threat to the national security and public order. They urged the Court not to be swayed by the lack of any violent or otherwise illegal action by any person following the publication of the articles.

25. Due account had to be taken of the special duties and responsibilities of the media, which included good faith investigation and avoidance of sensationalism. They drew attention in this connection to the personal attacks on President Voronin which appeared in some of the applicant's articles.

2. The applicant

26. The applicant agreed with the Government that the interference with its rights had been "provided for by law", but considered that it was not "necessary in a democratic society".

27. In particular, the applicant argued that the courts did not provide any detailed reasons for applying the sanction and did not even identify which part of each publication created a danger for public safety or for the territorial integrity of Moldova. It was only in the Government's observations that an attempt had been made to give reasons for the interference.

28. The applicant submitted that, even in the light of the additional reasons invoked by the Government, the Court should find the sanction

applied to be unnecessary and disproportionate. In particular, while harsh criticism had been a feature of the relevant articles, those articles had referred to political matters concerning the external and internal politics of Moldova, matters which had to be given special protection under Article 10. Besides, it was not for the Government or the courts "to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists" (*Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, § 31).

B. The Court's assessment

1. General principles

29. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep the bounds set, *inter alia*, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see, for instance, the Observer and Guardian *v. the United Kingdom* judgment of 26 November 1991, Series A no. 216, § 59; *Busuioc v. Moldova*, no. 61513/00, § 56, 21 December 2004).

30. The most careful scrutiny on the part of the Court is called for when the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern (see, for example, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, § 44, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999-III, *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, § 68).

31. The right to freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any section of the community. In addition, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see, the *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, § 47).

32. Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it "duties and responsibilities", which also apply to the press. These "duties and

responsibilities" are liable to assume significance when, as in the present case, there is a question of endangering the national security and the territorial integrity of a State (*Han v. Turkey*, no. 50997/99, §§ 30 et seq., 13 September 2005). By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see the *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports* 1996-II, § 39, and *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I).

33. The test of necessity in a democratic society requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, § 62).

2. Application of the above principles in the present case

a. "Prescribed by law"

34. The Court agrees with the parties that the closure of the newspaper in the present case constituted an interference with the applicant's right to freedom of expression and that the interference was "prescribed by law" (see paragraphs 16 and 17 above).

b. Legitimate aim

35. The interference could be considered to have pursued the legitimate aims of protecting the national security and territorial integrity of the Republic of Moldova, given the sensitive topic dealt with in the impugned articles and the sometimes harsh language used.

c. "Necessary in a democratic society"

36. The Court considers that the domestic courts did not give relevant and sufficient reasons to justify the interference, limiting themselves essentially to repeating the applicable legal provisions. In particular, the courts did not specify which elements of the applicant's articles were problematic and in what way they endangered the national security and the territorial integrity of the country or defamed the President and the country.

37. In fact, the courts avoided all discussion of the necessity of the interference. The only analysis made was limited to the issue of whether the articles could be considered as good faith reproductions of public statements

for which the applicant could not be held responsible in accordance with the domestic law.

38. In light of the lack of reasons given by the domestic courts, the Court is not satisfied that they "applied standards which were in conformity with the principles embodied in Article 10" or that they "based themselves on an acceptable assessment of the relevant facts" (see *Jersild,* cited above, § 31).

39. Accordingly, there has been a violation of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

40. The applicant also complained that the closure of the newspaper violated its right to peaceful enjoyment of its possessions as secured by Article 1 of Protocol No. 1, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

41. The Government submitted that the applicant *de facto* continued its activities after the closure of its newspaper by publishing a new newspaper under a slightly different name, while preserving a number of elements of the old publication. In particular, it continued to use its old stamp, the newspaper name on its internet site changed every 2 seconds to the old name and some of the founders continued to work in the new newspaper. There was thus no proof of any pecuniary loss to the newspaper, nor any deprivation of its property.

42. The Court considers that the economic consequences of the court order to close the applicant's newspaper do not raise an issue separate from that examined under Article 10 above. They will be taken into consideration when examining the applicant's claim for just satisfaction.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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. Pecuniary damage

44. The applicant claimed 32,773 euros (EUR) in compensation for pecuniary damage caused by the closure of its newspaper. It based its estimation of lost profits on its income for the last year of activity before its closure. In accordance with its fiscal declaration for 2001, the company had made a profit of 94,280 Moldovan lei (MDL) (the equivalent of EUR 5,893 at the time), which the applicant multiplied so as to take account of the four years during which it had been prevented from operating. The amount requested also included debts accumulated by the applicant towards third parties as a result of its inability to pay them. Although a new newspaper was published thereafter, it was not published by the applicant.

45. The Government contested the level of compensation claimed by the applicant. They noted that the debts accumulated towards third parties under contracts prior to the closure would have been incurred in any event and would have been paid from the profits claimed before the Court. As for the calculation of those profits, the Government submitted that the applicant's economic performance could have worsened over the years and that the fiscal declaration took into account the profits made from all aspects of the applicant's activity, not only from publishing.

Finally, the Government contended that the applicant *de facto* continued to profit from publishing its newspaper, having registered it under a slightly different name.

46. The Court agrees with the Government that the debts accumulated under contracts signed before the court order for the closure of the newspaper would have been incurred regardless of that order. It thus rejects this part of the applicant's claim.

47. The Court considers it clear that the applicant must have suffered pecuniary damage as a result of the closure of its newspaper. It finds that a certain amount of lost profits has been substantiated by the applicant's fiscal declaration for the year immediately before the closure of the newspaper.

However, it considers that the evidence submitted cannot serve to provide a precise quantification of the profits lost since the applicant's economic performance could have fluctuated during the four years at issue.

48. As for the Government's argument that the declaration included profits from various activities described in the applicant's articles of

association, no evidence has been adduced to contradict the applicant's claim that it did not engage in any activity other than publishing the newspaper. However, the Court observes that the applicant's newspaper has *de facto* continued to be published under a slightly different name after what appears to have been only a brief pause needed to register the new publication. Accordingly, the Court can only partly accept the claim for pecuniary damage caused primarily during the transition to the new newspaper.

49. Making an overall assessment on an equitable basis and taking into account the applicant's somewhat related claims for non-pecuniary damage (see paragraphs 50-52 below), the Court awards the applicant EUR 8,000.

B. Non-pecuniary damage

50. The applicant claimed EUR 20,000 in compensation for the non-pecuniary damage caused by the closure of its newspaper. It submitted that, as a result of the closure, its reputation was seriously affected by its inability to honour its contractual obligations, the dismissal of all its employees, and the inability to plan or continue its activity. Moreover, the applicant's administration had been shocked by the courts' order to close the newspaper.

51. The Government disagreed with this claim and submitted that any damage caused to the applicant was the result of its own unethical, non-professional and abusive conduct which gravely insulted the State. The applicant was sanctioned after the courts duly balanced the interests at stake, including the particular role that the right to freedom of expression plays in a democratic society. Moreover, the applicant's administration should hardly have been shocked by the sanction since they had been warned to stop publishing the relevant materials and the law clearly included the possibility of a court order for the closure of a newspaper. In addition, the applicant did not prove that its failure to fulfil its contractual obligations had affected in any way its reputation. Finally, the Government submitted that in a number of previous cases where a violation of Article 10 had been established the Court rejected any just satisfaction claims, declaring that a finding of a violation constituted sufficient just satisfaction.

52. The Court considers that the various heads under which the applicant claimed compensation for moral damage are reflected in the calculation of the award of pecuniary damage which it has made. For that reason, it is not necessary to make any separate award for moral damage.

C. Costs and expenses

53. The applicant claimed EUR 2,666 for costs and expenses, of which EUR 2,625 were representation fees, and EUR 41 translator's fees. It relied

on a contract with its representatives and a list of hours worked by those representatives on its case. The hourly fee claimed was EUR 75.

54. The Government did not agree with the amounts claimed. They noted first that the applicant's representative had not submitted the list of hours worked on the case to which he referred in his just satisfaction claims. They later asked the Court to reject a late submission by the applicant of the list of hours worked by its representative on the case.

The Government also considered that the amount claimed by the applicant for representation was too high in the light of the average monthly wage in Moldova and the official fees paid by the State to *pro bono* lawyers.

55. The Court recalls that in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (see, for example, *Amihalachioaie v. Moldova*, no. 60115/00, § 47, ECHR 2004-III).

56. In the present case, deciding on an equitable basis, the Court awards EUR 1,500 for costs and expenses, plus any tax that may be applicable.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that there is no separate issue to be examined under Article 1 of Protocol No. 1 to the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 8,000 (eight thousand euros) in respect of pecuniary damage;

(ii) EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

(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;

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

Done in English, and notified in writing on 9 January 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

F. ELENS-PASSOS
Deputy Registrar

Nicolas BRATZA
President