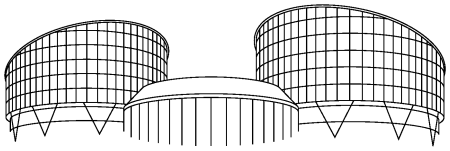

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF ORLOVSKAYA ISKRA v. RUSSIA

(Application no. 42911/08)

JUDGMENT

STRASBOURG

21 February 2017

FINAL

03/07/2017

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

In the case of Orlovskaya Iskra v. Russia,

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

Luis López Guerra, *President*,
Helena Jäderblom,
Helen Keller,
Dmitry Dedov,
Branko Lubarda,
Pere Pastor Vilanova,
Alena Poláčková, *judges*,
and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 31 January 2017,

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

PROCEDURE

1. The case originated in an application (no. 42911/08) 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 Redaktsiya Gazety *Orlovskaya Iskra* (hereinafter "*Orlovskaya Iskra*" or "the applicant organisation"), on 24 July 2008.

2. The applicant organisation was represented by Mr D. Krayukhin. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights.

3. The applicant organisation complained under Article 10 of the Convention about the classification of the articles it published as "election campaigning" material and about the fine imposed in the administrative offence case.

4. On 6 April 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a non-governmental organisation that publishes *Orlovskaya Iskra*, a newspaper in the Orel Region. As of March 2003, the Orel branch of the Communist Party of the Russian Federation and the Orel branch of the People's Patriotic Union of Russia, a nationwide movement,

were listed as the applicant organisation's founders. This information was specified on the front page of the newspaper.

6. Pursuant to the Articles of incorporation, the founders were in charge of setting up an editorial board and determining the editorial policy; in the case of disagreement on the editorial policy the matter was to be resolved by a meeting of the founders' representatives.

7. During the election campaign for the State Duma, the lower chamber of Parliament, on 2 December 2007, the applicant organisation expressed to the Electoral Committee of the Orel Region (see paragraph 41 below) its intention to accept proposals for publication for a fee and, as required by law, published the fees applicable to the publications on behalf of political parties (30,000 roubles (RUB) per page). The applicant organisation specified that the above fee "was not applicable to the newspaper's founder". The applicant organisation signed a contract with the Communist Party for this purpose for publications on 7, 14, 21 and 28 November 2007. The contract mentioned a fee of RUB 30,000 per page; the total amount of the contract was RUB 300,000 for ten pages. Some of the publications in the applicant organisation's newspaper on these dates did mention the Party's sponsorship, others did not (see paragraph 8 below).

A. Administrative offence case

8. Apart from the publications mentioned above, on 7 and 14 November 2007 the applicant organisation's newspaper also published, in the same weekly issues, two articles written by its staff correspondent, Ms O. Both articles were critical of Mr Stroyev, the then governor of the Orel Region and the former Chairman of the Federation Council (the upper chamber of the Russian Parliament). Governor Stroyev was a candidate at those elections: he was no. 1 on the regional list of United Russia (*Единая Россия*), a political party aligned with President Putin and dominant in the State Duma. The Communist Party was one of the main opposition parties at those elections.

9. The first article was entitled 'Hatred, Stroyev style'. It can be summarised as follows. It described Governor Stroyev as a person consumed by hatred towards people who oppose him. The journalist referred to the decision of the governor to wind up a publicly owned newspaper, *Gorod Orel*. According to journalist O., that decision was a direct consequence of a conflict between Mr Stroyev and the newspaper's former editor-in-chief who kept criticising Stroyev's policies. The speaker of the municipal council, who was politically weak owing to a corruption scandal involving municipal land, was unable to oppose the decision of the governor to close the newspaper. Most of the regional journalists under Stroyev became servile; those few who, like the editor-in-chief of *Gorod Orel*, remained independent and refused to flatter Mr Stroyev, were

subjected to pressure and fell victim to Mr Stroyev's hatred. The article then turned to the story of two deputies of the regional legislature. They were elected as members of the Communist Party and were originally in opposition to Mr Stroyev, but later they both became members of *United Russia*. One of them was a businessman. The author suspected that the first deputy had changed political sides because of very serious pressure exerted by the Stroyev administration on local businessmen. The second deputy was a history professor. The article suggested that his decision to leave the Communist Party was also forced. The journalist ironically supposed that in fact Mr Stroyev did not want United Russia to win the elections, since he was doing everything to make the electorate angry with the ruling party. In 2006 the town population voted in large numbers for the Communist Party, which was in fact a vote of disapproval of Mr Stroyev's policies. However, the journalist supposed that Mr Stroyev's personal interests always prevailed over those of the United Russia party. The town mayor tried to protect himself by joining United Russia, but this was a weak defence against Mr Stroyev's hatred. The only people Mr Stroyev loved and defended were his own relatives and protégés. The article cited the example of Mr Stroyev's nephew, a businessman suspected of abuse of public funds and fraud. His case was still pending; the article suggested that regional law-enforcement agencies being discouraged from pursuing the investigation actively. The article then turned to the dismissal of the head of the regional public Audit Chamber, who reported on abuses of funds allocated for road maintenance. The newly appointed head of the Audit Chamber, who was Mr Stroyev's man, came to the opposite conclusion, namely that the manipulation of the road funds had been perfectly in order. Nevertheless, the money had been spent; as a result, the federal authorities had had to allocate additional funds for road maintenance in the Orel Region. Mr Stroyev tried to get credit for that funding, but it was not United Russia's money that had been used, as they claimed, but taxpayers'money. In the opinion of the author, by trying to present the whole situation as his personal achievement Mr Stroyev was making a fool of President Putin and of the population of the Orel Region.

The article had a long post-scriptum. It cited the European Court's findings in the case of *Chemodurov v. Russia* (no. 72683/01, judgment of 31 July 2007). That case concerned a defamation claim lodged by a governor of another Russian region against a journalist of a local newspaper. The case ended with a finding of a violation of Article 10 of the Convention by the Court. The author alluded to similarities between her criticism of Mr Stroyev's policies and the situation in the *Chemodurov* case.

10. The second article was entitled 'Stroyev sues people: people sue Stroyev'. It also concerned several topics. It opened with the statement that the electorate of Orel Region did not trust the authorities and at the 2006 and 2007 elections preferred to support the Communist Party. Next, it

touched upon the story of Ms Ch., a former forest inspector who was dismissed from her job as a result of a reorganisation of the forestry authority. Forty-two other workers of the forest authority also lost their jobs. The article alleged that the reform of the forest authorities was initiated by Governor Stroyev in breach of federal legislation. It suggested that the reform was driven by the need to facilitate industrial tree-cutting. Ms Ch. sued the regional authorities, and at the relevant time the proceedings were pending. However, in the opinion of the journalist, there was little hope for impartiality on the part of the regional courts. The article then turned to the case of Ms G., who had made statements critical of the governor during a public rally and had been prosecuted for slander. The article then analysed recent public statements of the governor, who had criticised the policy lines of former President Yeltsin, whereas he himself during that period had been Chairman of the Federation Council, and therefore the second most important statesman in the country. According to the journalist, the proceedings in the case of Mr G. were adjourned, probably because Governor Stroyev wanted to avoid a scandal before the date of elections. The article closed with the suggestion that President Putin should not have associated himself such controversial figures as Governor Stroyev.

11. On 17 November 2007 the Working Group on Informational Disputes of the regional Electoral Committee examined both articles. The Working Group concluded that the articles contained elements of electoral campaigning (*агитация*). The Working Group concluded as follows:

The publications contained "negative, purposeful, systematically published information about a member of the High Political Council of the United Russia political party ... Mr E. Stroyev. The above-mentioned publications have created a negative attitude on the part of the voters towards ... United Russia. Although the text of the articles does not call for people to vote for or against United Russia, all the electorate understand that this is in fact counter-campaigning [against Mr Stroyev]". The publications "did not correspond to the current information policy of the organisations editing mass media", which (the policy) was "aimed at informing the voters about the development of the electoral campaign ... [and] about the political parties participating in it". Those articles, in the opinion of the Electoral Committee, fell "outside the information space created by the political parties during the ongoing electoral campaign". The publication of those articles was not paid for from the official campaign fund of any party participating in the campaign, contrary to section 52 § 6 of the Electoral Rights Act of 2002.

12. Consequently, in the opinion of the Electoral Committee, publication of those articles amounted to a breach of electoral law punishable by a fine in accordance with Article 5.5 of the Federal Code of Administrative Offences (CAO).

13. The official of the Electoral Committee compiled an administrative offence record against the applicant organisation, referring to the legislative provisions defining "campaigning" (see paragraph 40 below):

> "[The applicant organisation] has committed an administrative offence: publications on 7 and 14 November 2007 containing elements of election campaigning as defined in sections 10 and 55 § 1(6) of the State Duma Deputies Elections Act" ...
>
> Liability for this offence is prescribed under: Article 5.5 § 1 of the CAO."

14. The case was then submitted to a justice of the peace. On 29 November 2007 the justice of the peace examined the case. At the hearing the editor-in-chief of the newspaper explained that both articles were informational in essence and were not a part of the election campaign. They reflected the author's opinion of Governor Stroyev. Consequently, there was no need for those articles to be paid for from any candidate's campaign fund.

15. The judge held that, according to the State Duma Deputies Elections Act of 2005, taken in conjunction with the Electoral Rights Act, "election campaigning" meant publications where information about one of the candidates prevailed and was combined with negative comment about him or her. Having studied the impugned articles the judge agreed with the Electoral Committee that they primarily concerned candidate Stroyev, and secondly were negative. The judge concluded that those articles were in substance election "campaigning". Such material should either have been paid for from the campaign fund of one of the candidates or have been published free of charge; in any event, the newspaper had been required to indicate who had sponsored the publication. No such mention had been made in the articles. Consequently, the publication of both articles amounted to a breach of the electoral law. The applicant organisation was therefore found guilty of the administrative offence described in Article 5.5 § 1 of the Code of Administrative Offences of 2001 (hereinafter "the CAO"). The justice of the peace ordered the applicant organisation to pay a fine of 35,000 roubles (RUB, equivalent to 1,000 euros (EUR) at the time).

16. The applicant organisation appealed to the Zheleznodorozhny District Court of Orel. On 27 December 2007 it heard the applicant organisation's representatives and rejected the appeal. The relevant extract from the judgment reads as follows:

> "Having regard to the fact that the publication of the above articles took place during an election campaign period, the judge considers that the above-mentioned articles contained elements of election campaigning, and therefore could be described as campaign literature. This conclusion is supported by the words of the representatives of the newspaper ... who acknowledged that the articles contained criticism of Governor Stroyev ..."

17. The appeal decision entered into legal force on the same date.

18. On unspecified dates the applicant organisation received a copy of this decision and lodged a supervisory-review application with the President of the Orel Regional Court. The scope of that application remains unclear.

19. Without holding a hearing, on 29 January 2008 the acting president of the court issued a decision dismissing the application. The reasoning of the decision of the acting president was identical to that of the lower courts. On an unspecified date the applicant organisation received a copy of the acting president's decision.

20. The applicant organisation then lodged a supervisory-review application with the President of the Supreme Court of Russia. The scope of this application remains unclear. On 19 June 2008 the Vice-President dismissed it. On an unspecified date the applicant organisation received a copy of this decision.

B. Constitutional complaint

21. On an unspecified date the applicant organisation introduced an individual application before the Constitutional Court of Russia, arguing that the impugned provisions of the Electoral Rights Act and the State Duma Deputies Election Act ran counter to freedom of the press. The Acts *de facto* regarded any critical material published during a pre-election period as "campaigning", and imposed additional requirements on such publications.

22. By a letter of 23 October 2008 the Registry of the Constitutional Court informed the applicant organisation that its application was not allowed because, in substance, it was merely challenging the factual and legal findings made by the courts in the administrative offence case.

23. On an unspecified date the applicant organisation resubmitted its application to the Constitutional Court. On 25 December 2008 a panel of judges of the Constitutional Court issued a decision (*определение*) refusing examination of the application. It held as follows:

> "In its ruling of 30 October 2003 the Constitutional Court made the following statement of principle concerning a distinction between information for voters and pre-election campaigning. To protect the right to free elections, freedom of expression on the part of the mass media may be restricted, provided that the balance of constitutional values has been respected ...
>
> [The Electoral Rights Act] distinguishes between information for voters appearing in the mass media and pre-election campaigning by them. Both information and campaigning can influence voters to make certain choices, thus the obvious and only criterion to distinguish between them would be the existence of a particular aim, namely to incline voters to support or oppose a certain candidate ... Without such an aim in mind there would be no dividing line between information and campaigning, to the effect that all information would amount to campaigning. This would go against the constitutional guarantees of freedom of information and freedom of expression ...

> It is incumbent on the courts and other authorities to establish that there is a campaigning aim in each case ... Thus, in view of the above statement of principle, the impugned legislative provisions cannot be considered to have violated the applicant organisation's rights or freedoms ... Establishment of the specific circumstances (whether or not the information provided by the applicant organisation concerned the electoral campaign rather than the reporting on the candidate's professional activity as a governor) are beyond of the Constitutional Court's competence ..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Review of decisions concerning administrative offences under the CAO

1. Ordinary appeal procedure

24. Under the CAO, depending on the subject matter decisions concerning administrative offences could be issued by a non-judicial authority or a court (Chapter 23 of the CAO).

25. At the relevant time, Chapter 30 of the CAO contained provisions concerning review of such decisions.

26. Review could be sought by the person or legal entity accused of the administrative offence, the victim of the offence, or their representatives (Article 30.1). If the decision on the administrative offence concerned a legal entity or a person engaged in entrepreneurial activities, it was reviewed by a commercial court according to the rules of commercial procedure (Article 30.1).

27. An ordinary appeal against a decision on an administrative offence could be lodged within ten days (or fifteen days, for some offences) following receipt of the copy of the decision (Article 30.3). The appeal should be examined within ten days (or within shorter periods, for some offences) following receipt of the case file to the reviewing court or authority (Article 30.5). The reviewing authority or court was not bound by the scope of arguments and reviews in the case in its entirety (Article 30.6).

28. Article 30.10 gave a prosecutor a right to seek review of a decision on an administrative offence, within the procedure and time-limits set in Articles 30.1 – 30.3 of the CAO.

2. Supervisory review procedure

29. Until 20 December 2008, Article 30.11 of the CAO provided for supervisory review of final court decisions taken in respect of administrative offences. A regional prosecutor or his deputy, the Prosecutor General of the Russian Federation or his deputy had a right to apply for such a review. Pursuant to the ruling no. 5 of 24 March 2005 by the Plenary Supreme Court of Russia, those prosecuted in administrative offences cases also had a right to lodge a supervisory-review application (§ 34).

30. If a supervisory-review judge had doubts about the lawfulness of the impugned court decisions, he or she could request the case file and then examine the case in its entirety, going beyond the grounds for review raised by the author of the supervisory-review application (§ 34 of the ruling of 24 March 2005).

31. Supervisory review was to be carried out by the president of the regional court or their deputies, and by the President of the Supreme Court of Russia or her deputies. Reviewing this provision the Constitutional Court of Russia stated that the reviewing court was to inform the person concerned by the administrative offence proceedings about the application for review lodged by the victim (decision no. 113-O of 4 April 2006 concerning the constitutional interpretation of Article 30.11 of the CAO; this decision was officially published in July 2006). The Constitutional Court also stated that until legislative amendment of the CAO concerning the scope of review, grounds for review, the reviewing courts' powers, time-limits for seeking review and the procedure for such a review, the reviewing courts were to be guided by the relevant provisions of Chapter 36 of the Code of Commercial Procedure.

32. Article 30.11 of the CAO was deleted in December 2008. Article 30.12 provided that first-instance and appeal judgments which had become final could be challenged by way of review before regional courts and the Supreme Court of Russia. Apparently, the decision no. 113-O of 4 April 2006 was not applied by some regional courts (see decision no. 4a10-790 of 31 August 2010 by the Chelyabinsk Regional Court, and, *a contrario*, decision no. 4-a-854 of 24 November 2010 by the Rostov Regional Court); some regional courts stated that this decision was no longer applicable following the deletion of Article 30.11 of the CAO during the legislative reform in December 2008 (see decision no. 4a10-1227 of 28 December 2010 by the Chelyabinsk Regional Court).

B. Activity of mass media outlets during election periods

1. Constitution of the Russian Federation

33. Under Article 29 of the Russian Constitution everyone has a right to freedom of expression and a right to freely seek, receive, transfer, produce or disseminate information, by any lawful means; the freedom of mass information (*свобода массовой информации*) is also protected.

34. Russian citizens have a right to elect and to be elected to public office and to participate in referendums (Article 32 of the Constitution).

35. Article 55 of the Constitution provides that rights and freedoms may be restricted by a federal statute only in so far as this is necessary in order to protect the foundations of the constitutional regime, morals, health, rights

and lawful interests of others, or in the interests of defence of the country and national security.

2. Legislation

(a) Regulations concerning mass media outlets

36. The Mass Media Act of 1991 (Federal Law no. 2124-1 of 27 December 1991) defined a mass media outlet as a printed periodical, a television station, a radio station, a television programme, a video programme or "another form of periodical dissemination of mass information under a constant designation (title)" (section 2 of the Act).

37. The Electoral Rights Act of 2002 (Federal Law no. 67-FZ of 12 June 2002) provided that organisations releasing mass media could participate in the provision of "information" to voters (section 47). The relevant parts of sections 45 and 48 of the Act read as follows:

"Section 45. Information for voters and referendum participants

1. Information for voters and referendum participants is disseminated by public authorities, local authorities, committees, organisations that disseminate mass media, persons and legal entities pursuant to this Law ...

2. The content placed in the mass media or disseminated in other ways must be objective, truthful, and must not violate the equality of candidates or electoral blocs.

3. Committees should disseminate information to voters and referendum participants, including by way of the mass media, about the process of preparing and running an election or referendum, about the time-limits and procedures for accomplishing actions relating to an election or referendum, about the relevant legislation, and about candidates or electoral blocs.

4. The activity of mass media outlets aiming at informing voters or referendum participants should not be hindered.

5. Television or radio programmes or publications in print media containing information on an election or referendum should only present this information by way of a separate information bulletin, without comment. Such programmes or publications should not give preference to one of the candidates or electoral blocs ... including in terms of air time for their pre-election activities or in terms of print space for such information ...

Section 48. Pre-election campaigning or referendum campaigning

1. Russian citizens and non-governmental organisations have a right to engage in lawful pre-election campaigning by lawful means ...

2. The following actions during an election campaign should be classified as pre-election campaigning:

a) calls to vote for a candidate or candidates, a list or lists of candidates, or against them;

b) expression of preference for one of the candidates or an electoral bloc, in particular by specifying the name of the candidate (list of candidates or electoral bloc)

for which the voter will vote, except when it is by way of an opinion poll pursuant to section 46 ...

c) description of possible consequences in the event that a specific candidate gets elected or does not get elected ...

d) dissemination of information with manifest prevalence of data (*сведения*) about one candidate, a group of candidates, or an electoral bloc, with positive or negative comment;

e) dissemination of information about a candidate's activity that is not relevant to his professional activity or duties;

f) activities participating in the creation of a positive or negative attitude of voters toward a candidate, the electoral bloc of that candidate, or a list of candidates.

2.1. Actions committed by representatives of mass media outlets and actions listed in sub-paragraph 2(a) should be classified as pre-election campaigning if those actions have been taken with the aim of inducing voters to vote for a candidate, a number of candidates, or a list or lists of candidates, or against any of these; the actions listed in sub-paragraphs 2(b)-2(f) should be classified as pre-election campaigning if they have been taken with that intent more than once ...

7. The following are not allowed to carry out pre-election campaigning or to disseminate any campaign material ...

(i) representatives of mass media outlets when carrying out their professional duties ..."

38. "Election campaigning" in print and broadcast media begins twenty-eight days before the election and ends the day before election day (section 49 of the Electoral Rights Act).

39. All "campaign" material in the print media had to contain information as to which candidate's electoral fund paid for the publication; if no fee was indicated, the publication was to indicate who had asked for the publication (section 52 § 6 of the Electoral Rights Act). The obligation to indicate the sponsor was incumbent on the editorial board of the print medium (ibid.).

40. The State Duma Deputies Election Act of 2005 defined "pre-election campaigning" by listing types of situations such as, *inter alia*, dissemination of information which was predominantly about one political party presenting a list of candidates, a candidate or candidates, in combination with positive or negative comment (section 55 § 1(4) of the Act); activities carried out during an election campaign, contributing to the creation of a positive or negative attitude on the part of voters towards a political party presenting a list of candidates or a candidate or candidates (section 55 § 1(6) of the Act). To fall within the scope of "campaigning", such activities were to aim at inducing voters to vote for or against a list of candidates or for or against a candidate or candidates from such a list (section 10).

41. The Central Electoral Committee of the Russian Federation, regional electoral committees, local electoral committees within districts, towns or other areas, as well as electoral committees at voting stations are responsible

for the organisation and running of elections, and ensure the exercise of electoral rights by the citizens (section 18 of the State Duma Deputies Election Act). Regional and local mass media outlets are required to inform a regional electoral committee about their intention to publish campaigning material submitted by political parties and about the related fees and other relevant conditions (section 57 § 11).

(b) Penalties for breaching the regulations

42. Article 5.5 § 1 of the Federal Code of Administrative Offences was entitled "Violation of the procedure for participation of the mass media in the information support of the elections or referenda". This Article punished violations of the procedure for publishing materials (including campaigning material) that were related to an electoral campaign and elections. It concerned chief editors of the mass media or its editorial board, legal entities dealing with broadcasting, as well as "other organisations that disseminate material for mass consumption".

3. Constitutional Court of Russia

(a) Ruling of 30 October 2003

43. In 2003 the Constitutional Court of Russia examined several individual applications and an application from a group of members of the State Duma. On 30 October 2003 the Constitutional Court issued ruling no. 15-P concerning sections 45 § 5 and 48 § 2 and § 7 of the Electoral Rights Act (see paragraph 37 above). The ruling was published in October and November 2003 in several official bulletins and journals.

(i) The judgment

44. The Constitutional Court found as follows:

- In order to secure free elections the federal legislator is empowered to set in place procedures and conditions for information support (*информационное обеспечение*) for the elections. Free elections also require protection of the right to information and the freedom to express opinions. Therefore, the legislator must protect citizens' rights to receive and disseminate information about elections, while striking a balance between two constitutional values, namely the right to free elections and freedom of information and expression, avoiding inequality and disproportionate restrictions.
- Mass media outlets carry out a social function consisting in information support for elections, and should accompany the free expression of the citizens' choice and transparent elections. The exercise of the freedom of mass information is accompanied by particular duties and a particular responsibility on the part of mass media outlets. Thus, while acting on the basis of editorial independence and the rules of self-

regulation, the representatives of the mass media outlets must take ethical and balanced stances and cover election campaigns in a fair, balanced and impartial manner. Distinguishing between two elements of information support for elections (namely "information" and "campaigning") the Electoral Rights Act is intended to exclude representatives of mass media outlets from "campaigning" activities. This distinction is aimed at securing open elections and at ensuring the process of formation (*формирование*) of the free expression of the citizens' choice. Unlike "information", "campaigning" is not subject to the requirement of objectivity.

- Limitation on the freedom to express opinion aims at protecting the right to free elections, which is one of the foundations of the constitutional regime, including the process of formation of the citizens' free expression of their choice.

- Restrictions or limitations on the freedom of mass information must be necessary and proportionate to the constitutionally recognised aims. Where constitutional rules allow such restrictions, the regulation should not impinge upon the very essence of the right or freedom being restricted, and should not empty it of its real content; the State should not use excessive measures; the regulatory legislation should be clear and precise, without room for extensive interpretation of the allowable restrictions and arbitrary application.

- All the above corresponds to the case-law of the European Court of Human Rights in relation to the scope of the freedom of expression and right to information in the context of elections (*Bowman v. the United Kingdom*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I).

- Both "campaigning" and "information" may induce the electorate to vote in favour of one choice or another. The only criterion for distinguishing between them is the presence of a special goal inherent in "campaigning", that is to induce voters to vote in one specific direction and to provide support, whether that is for or against a candidate. If this were not so the line between "information" and "campaigning" would be blurred to the extent that all information disseminated in this period would be classified as "campaigning". In view of the prohibition on mass media outlets' "campaigning", this would entail unlawful restrictions on freedom of expression and freedom of information, while also breaching the principles of free and open elections.

- As such, the expression of a positive or negative opinion about a candidate does not amount to "campaigning", and thus cannot entail administrative offence liability on the part of the mass media outlet. A special purpose consisting in the support or opposition to a specific candidate is necessary. "Expression of preference" is a manner of expressing an opinion. Thus, expression of a preference by a

representative of a mass media outlet cannot be classified as an offence in the absence of a campaigning purpose.

- The relevant provisions of the Act did not permit an extensive interpretation of the notion of "pre-election campaigning" in so far as the ban concerns the professional activities of mass media. The relevant provisions mean that unlawful campaigning includes only the premeditated acts listed in section 48 § 2, which are directly aimed at such campaigning and differ from providing information to the voters.

45. The Constitutional Court also ruled that section 45 § 5 should not be interpreted as providing a basis for prohibiting the mass media from expressing their opinions or from comment outside specific news bulletins. The Constitutional Court stated that "other actions" (beyond those listed in section 48), aimed at inducing voters to vote for candidates, lists of candidates or against them, against all candidates or against all lists, should not be treated as "pre-election campaigning". The Constitutional Court concluded that this constitutional interpretation of the relevant provisions of the Electoral Rights Act excludes any other interpretation in judicial practice and also any other interpretation of similar provisions of other legislation. The Constitutional Court also stated that this constitutional interpretation of the legal provisions was mandatory for everyone and excluded any other interpretation by the courts in respect of the same provisions or similar provisions of other legal acts. Furthermore, the Constitutional Court concluded in respect of the individual applicants that their cases were to be re-examined, unless there were obstacles to doing so.

(ii) Separate opinions

(α) Judge Gadzhiyev

46. Judge Gadzhiyev expressed a separate opinion, noting that in *Bowman v. the United Kingdom* (cited above) the European Court assessed the freedom of expression in the light of the right to free elections, which means that neither has priority over the other. This is the only kind of approach which makes it possible to seek a balance between these equally valued fundamental rights. The exercise of one right creates "inherent boundaries" for the other right. Having regard to Article 15 of the Russian Constitution, which defines Russia's international treaties as "an integral part of its legal system", the choice between the relevant legitimate aims may be used to set limits on a protected right, in line with the European Convention. Given the aims listed in Article 10 of the European Convention, only some of the aims listed in Article 55 of the Russian Constitution may be referred to when limits are set on the freedom to express opinions.

(β) Judge Kononov

47. Judge Kononov also expressed a separate opinion, as follows. While upholding the majority's restrictive interpretation and application of the "campaigning" regulations, the judge noted that some provisions of the Electoral Rights Act could not but be assessed as absurd and utterly lacking reasonable grounds. All possible and justified restrictions on the freedom of the mass media are listed in section 4 of the Mass Media Act. There is no reason to treat an electoral campaign as an emergency situation that would justify wider limitations on rights and freedoms. Quite to the contrary, the voters' need to receive and disseminate information, to express opinions, and to know about views held in society are greater during an election campaign. Print, broadcast and other media serve as a necessary means of exercising the right to free choice, without losing their autonomous and independent role in society. Freedom to express opinions should be given a wider possible interpretation. In 1999 the Constitutional Court of Slovakia declared a similar statute unconstitutional, dismissing the argument justifying the restriction in the interest of free competition among political actors. That court held that, democracy not being a form of government instituted exclusively for the sake of political parties, denial of fundamental rights and freedoms for the benefit of parties equals denial of democracy.

48. Judge Kononov concluded that there were no compelling reasons for opposing freedom of expression and freedom of choice, and thus no justification for putting in place special limitations on the mass media during an election period. Before the Constitutional Court the Russian authorities referred to the need to counter "black PR", or negative paid-for publications, rather than to the need to ensure free choice for voters. One of the Election Commission officials admitted that if there had been an efficient mechanism to supervise payment for publications there would have been no need to create restrictions on the wording of "campaigning" by the mass media. In Judge Kononov's view, the issue of paid-for publications should have been resolved by other, more appropriate, means, rather than by restricting fundamental freedoms.

(γ) Judge Yaroslavtsev

49. In his separate opinion Judge Yaroslavtsev considered that the impugned provisions of the Electoral Rights Act violated freedom of expression and the principle of free elections. Free elections require free expression of the citizens' choice, which is achievable if there is a choice available, and also unhindered expression of preferences by way of free expression of opinions for or against a candidate. The free expression of choice requires access to information, which should be truthful and objective. Referring to the European Court's judgment in *Bowman* (cited above), the majority overlooked that a conflict between freedom of expression and the right to free elections arises only in "certain

circumstances" so that "usually" restrictions on freedom of expression "would not be acceptable". In the absence of any pressing social need during a pre-election period, varied opinions and information, including information containing preference for a candidate, should be allowed to circulate freely. The requirements of objectivity and truthfulness apply, so that the relevant information will guide voters, irrespective of the preference expressed within the text of the information.

(b) Other decisions

50. In 2013 the Constitutional Court examined an application concerning the provisions contained after 2005 in section 48 § 2.1 of the Electoral Rights Act. It issued an inadmissibility decision, no. 512-O dated 23 April 2013. The Court stated as follows:

As stated in the ruling of 30 October 2003, it was necessary to distinguish between campaigning and information, because without such a distinction there would be adverse consequences for the mass media, in that the constitutional guarantees of freedom of expression and information would be unlawfully restricted; it would also violate the principle of free and open elections. The primary criterion for distinguishing between campaigning and information had to be the presence of a particular campaigning aim, namely to incline voters in one direction, to secure either support for or opposition to a specific candidate or electoral bloc.

The Constitutional Court also found, in its 2003 ruling on the provisions of the Electoral Rights Act concerning the procedure for giving information, that news bulletins and printed publications must confine their information about pre-election events to one separate information note, without comment and without giving preference to any one or electoral bloc. The Constitutional Court held in the ruling that the above provisions should not be interpreted as banning the mass media from expressing opinions or from commenting outside the scope of the information note.

Thus, assessing the impugned legislative provision within the scope of the current regulatory framework and the above-mentioned statements of principle by the Constitutional Court, and taking into account the special role of the mass media in the electoral process, the impugned provision could not be perceived as giving preference to the mass media over other participants in the electoral process. Thus, the impugned provision did not violate the applicant organisation's rights in the relevant aspect.

51. By ruling no. 7-P of 16 June 2006 the Constitutional Court examined various provisions of the Electoral Rights Act, including its sections 48 § 5 and 52 § 6, in so far as it allegedly prevented citizens (who were not themselves candidates or representatives of candidates or electoral groups) from engaging in "election campaigning" for or against a candidate or a list of candidates, and thereby incurring expenses outwith election funds. The Constitutional Court held as follows:

Having regard to the need for free expression for citizens during elections held at reasonable periods and the need for such elections to be of a competitive and transparent nature, the federal legislature had to put in place a set of criteria for information flow, including rules for election campaigning and its funding.

To reconcile the exercise of electoral rights, freedom of expression, and freedom of mass information, the federal legislature had discretion to choose appropriate methods and means that take account of the historical conditions that prevail at a particular stage of the country's development. To reconcile any conflict between these competing rights and freedoms, the legislature was to maintain the balance of constitutional values and not put in place disproportionate restrictions that would not be necessary in a democratic society and that would impinge upon the very essence of the protected rights.

The exclusion of Russian citizens from election campaigning and the absence of legislative safeguards would mean, in substance, refusing them a realistic opportunity to influence the electoral process, confining them to the action of casting a vote. The absence of free political discussion and opportunities for a free exchange of opinions, including both candidates and citizens, during the elections would make it impossible to consider such elections as free.

The legislature had to ensure adequate exercise of the citizens' right to receive and impart information about elections. Under the Electoral Rights Act information flow was ensured by the provision of information about candidates, dates and the procedural for electoral acts, as well as by election campaigning aimed at inducing voters to vote for or against a candidate.

Candidates were allowed to put in place campaign funds and to incur expenses from such funds for campaigning purposes and to have broadcast time and access to the print media, both paid and free of charge. Other citizens were allowed to engage in election campaigning without incurring expenses by way of public gatherings or otherwise. They could also make contributions to campaign funds within the limits prescribed by law.

At that stage of Russia's development the need to ensure transparent financing of elections required reinforced safeguards. Therefore, also taking into account the current realistic possibility of control over the financing of elections, the applicable regulatory framework, including sections 48, 51, 52, 58 and 50 of the Electoral Rights Act, pursued a legitimate aim and did not upset the balance of constitutional values. It also complied with the criterion of being necessary in a democratic society and was not disproportionate *vis-à-vis* the constitutionally protected aims.

Judge Kononov issued a separate opinion, noting that a political discussion could not be a dispute about objective facts. Opinions and comments, by their nature, contain value judgments and the potential to induce a choice or a preference. Moreover, it is frequently difficult to

determine the exact intention behind an utterance. Thus, exclusion of value judgments from the notion of "information", their arbitrary classification as "campaigning", and the removal from ordinary citizens of the opportunity to express their attitude toward a candidate and his or her policy choices significantly impinged upon the constitutional rights set out in Article 29 of the Constitution.

III. COUNCIL OF EUROPE AND OTHER DOCUMENTS

A. Council of Europe Committee of Ministers

52. Recommendation No. R (99)15 of the Committee of Ministers to Member States on Measures concerning media coverage of election campaigns:

> "Appendix to Recommendation No. R (99)15
>
> Scope of the Recommendation
>
> The principles of fairness, balance and impartiality in the coverage of election campaigns by the media should apply to all types of political elections taking place in member States, that is, presidential, legislative, regional and, where practicable, local elections and political referenda.
>
> These principles should also apply, where relevant, to media reporting on elections taking place abroad, especially when these media address citizens of the country where the election is taking place.
>
> I. Measures concerning the print media
>
> 1. Freedom of the press
>
> Regulatory frameworks on media coverage of elections should not interfere with the editorial independence of newspapers or magazines nor with their right to express any political preference.
>
> ...
>
> II. Measures concerning the broadcast media
>
> 1. General framework
>
> During electoral campaigns, regulatory frameworks should encourage and facilitate the pluralistic expression of opinions via the broadcast media.
>
> With due respect for the editorial independence of broadcasters, regulatory frameworks should also provide for the obligation to cover electoral campaigns in a fair, balanced and impartial manner in the overall programme services of broadcasters. Such an obligation should apply to both public service broadcasters as well as private broadcasters in their relevant transmission areas.
>
> In member States where the notion of "pre-electoral time" is defined under domestic legislation, the rules on fair, balanced, and impartial coverage of electoral campaigns by the broadcast media should also apply to this period.
>
> ...

5. Paid political advertising

In member States where political parties and candidates are permitted to buy advertising space for electoral purposes, regulatory frameworks should ensure that:

- the possibility of buying advertising space should be available to all contending parties, and on equal conditions and rates of payment;

- the public is aware that the message is a paid political advertisement.

Member States may consider introducing a provision in their regulatory frameworks to limit the amount of political advertising space which a given party or candidate can purchase.

III. Measures concerning both the print and broadcast media

1. "Day of reflection"

Member States may consider the merits of including a provision in their regulatory frameworks to prohibit the dissemination of partisan electoral messages on the day preceding voting.

...

IV. Measures to protect the media at election time

1. Non-interference by public authorities

Public authorities should refrain from interfering in the activities of journalists and other media personnel with a view to influencing the elections. ..."

53. Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns:

"The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe;

Noting the important role of the media in modern societies, especially at the time of elections;

Considering the constant development of information and communication technology and the evolving media landscape which necessitates the revision of Recommendation No. R (99) 15 of the Committee of Ministers on measures concerning media coverage of election campaigns;

Aware of the need to take account of the significant differences which still exist between the print and the broadcast media;

Considering the differences between linear and non-linear audiovisual media services, in particular as regards their reach, impact and the way in which they are consumed;

Stressing that the fundamental principle of editorial independence of the media .assumes a special importance in election periods;

Underlining that the coverage of elections by the broadcast media should be fair, balanced and impartial;

Recalling the basic principles contained in Resolution No. 2 adopted at the 4th Ministerial Conference on Mass Media Policy (Prague, December 1994), and

Recommendation No. R (96) 10 of the Committee of Ministers on the guarantee of the independence of public service broadcasting;

Noting the emergence of public service media in the information society as elaborated in Recommendation Rec(2007)3 of the Committee of Ministers on the remit of public service media in the information society;

Considering that public service media are a publicly accountable source of information which have a particular responsibility in ensuring in their programmes, a fair, balanced and thorough coverage of elections, which may include the carrying of messages of political parties and candidates free of charge and on an equitable basis;

Noting that particular attention should be paid to certain specific features of the coverage of election campaigns, such as the dissemination of opinion polls, paid political advertising, the right of reply, days of reflection and provision for pre-election time;

Stressing the important role of self-regulatory measures by media professionals themselves – for example, in the form of codes of conduct – which set out guidelines of good practice for responsible, accurate and fair coverage of election campaigns;

Recognising the complementary nature of regulatory and self-regulatory measures in this area;

Convinced of the usefulness of appropriate frameworks for media coverage of elections to contribute to free and democratic elections, bearing in mind the different legal and practical approaches of member states in this area and the fact that it can be subject to different branches of law;

Acknowledging that any regulatory framework on the media coverage of elections should respect the fundamental principle of freedom of expression protected under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights;

Recalling Recommendation Rec(2004)16 of the Committee of Ministers on the right of reply in the new media environment which allows the possibility for easy-to-use instant or rapid correction of contested information,

Recommends that the governments of the member states, if they have not already done so, examine ways of ensuring respect for the principles stated hereinafter regarding the coverage of election campaigns by the media, and, where necessary, adopt appropriate measures to implement these principles in their domestic law or practice and in accordance with constitutional law.

...

Principles

I. General provisions

1. Non-interference by public authorities

Public authorities should refrain from interfering in the activities of journalists and other media personnel with a view to influencing the elections.

2. Protection against attacks, intimidation or other types of unlawful pressure on the media

Public authorities should take appropriate steps for the effective protection of journalists and other media personnel and their premises, as this assumes a greater

significance during elections. At the same time, this protection should not obstruct the media in carrying out their work.

3. Editorial independence

Regulatory frameworks on media coverage of elections should respect the editorial independence of the media.

Member states should ensure that there is an effective and manifest separation between the exercise of control of media and decision making as regards media content and the exercise of political authority or influence.

...

5. Professional and ethical standards of the media

All media are encouraged to develop self-regulatory frameworks and incorporate self-regulatory professional and ethical standards regarding their coverage of election campaigns, including, *inter alia*, respect for the principles of human dignity and non-discrimination. These standards should reflect their particular roles and responsibilities in democratic processes.

6. Transparency of, and access to, the media

If the media accept paid political advertising, regulatory or self-regulatory frameworks should ensure that such advertising is readily recognisable as such.

Where media is owned by political parties or politicians, member states should ensure that this is made transparent to the public.

...

II. Measures concerning broadcast media

...

5. Paid political advertising

In member states where political parties and candidates are permitted to buy advertising space for election purposes, regulatory frameworks should ensure that all contending parties have the possibility of buying advertising space on and according to equal conditions and rates of payment.

Member states may consider introducing a provision in their regulatory frameworks to limit the amount of political advertising space and time which a given party or candidate can purchase.

Regular presenters of news and current affairs programmes should not take part in paid political advertising."

B. Venice Commission

1. Opinion no. 657/2011

54. Opinion no. 657/2011 by the European Commission for Democracy Through Law (the Venice Commission), on the Federal Law on the Election of the Deputies of the State Duma of the Russian Federation, adopted by the Council for Democratic Elections at its 40th meeting (Venice, 15 March

2012) and by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012):

"84. As Paragraph II.1 of the Code of Good Practice in Electoral Matters states, "democratic elections are not possible without respect for human rights, in particular freedom of expression and of the press". An open debate of ideas is vital in a democratic system, especially in an election period. Actually, freedom of the press is more vital in campaigning than in any other moment of political life, since it permits to express opinions on candidate programs and to criticize public powers. Voters cannot form their will properly without free debate of ideas, not only between candidates, but also by journalists and citizens in the media.

85. As established by the case-law of the European Court of Human Rights, restrictions of these freedoms must have a basis in law, be in the public interest and comply with the principle of proportionality. According to this principle, fewer restrictions may be admitted concerning private media than public media.

86. However, there are a number of limitations on media that can restrict freedom of speech disproportionately. For example, Article 51.4 imposes neutrality on public or private media and prohibits any comments or information given on election campaigning events. Article 55.2 defines as election campaign any action performed by members of the press if their professional actions are repeatedly performed to encourage voters to vote for or against some federal list of candidates.

87. It is true that the restrictions cited above are in the public interest, since their aim is to guarantee equality. However, these limitations put the proportionality principle at risk because the damages caused to freedom of expression are heavier than the benefits generated to equality. It must be added that similar ends could be reached with less dangerous means for the freedom of the press.

...

90. Article 55.7 prohibits campaigning by a number of categories of people. If such restrictions may favour neutrality of the state when applied to public officials, they do not appear as justified concerning members of the press (Article 55.7.8) ..."

2. Code of Good Practice

55. Opinion no. 190/2002, Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002):

"2.3. Equality of opportunity

a. Equality of opportunity must be guaranteed for parties and candidates alike. This entails a neutral attitude by state authorities, in particular with regard to:

i. the election campaign;

ii. coverage by the media, in particular by the publicly owned media;

iii. public funding of parties and campaigns.

...

3.1. Freedom of voters to form an opinion

a. State authorities must observe their duty of neutrality. In particular, this concerns:

i. media;

ii. billposting;

iii. the right to demonstrate;

iv. funding of parties and candidates.

...

Explanatory report

...

2.3 Equality of opportunity

18. *Equality of opportunity* should be ensured between parties and candidates and should prompt the state to be impartial towards them and to apply the same law uniformly to all. In particular, the *neutrality* requirement applies to the *electoral campaign* and *coverage by the media*, especially the publicly owned media, as well as to *public funding* of parties and campaigns. This means that there are two possible interpretations of equality: either "strict" equality or "proportional" equality. "Strict" equality means that the political parties are treated without regard to their present strength in parliament or among the electorate. It must apply to the use of public facilities for electioneering purposes (for example bill posting, postal services and similar, public demonstrations, public meeting rooms). "Proportional" equality implies that the treatment of political parties is in proportion to the number of votes. Equality of opportunity (strict and/or proportional) applies in particular to radio and television airtime, public funds and other forms of backing. Certain forms of backing may on the one hand be submitted to strict equality and on the other hand to proportional equality."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

56. The applicant organisation complained under Article 10 of the Convention about the classification of the material it published as "election campaigning" and the fine imposed in the administrative offence case for failure to indicate who had commissioned the publication of this material.

57. Article 10 of the Convention reads, in the relevant parts, as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ..."

A. Admissibility

1. The parties' submissions

(a) The Government

58. The Government considered that the supervisory-review procedure under the CAO was not a remedy, for the following reasons:

A trial judgment issued by a justice of the peace or a district court was amenable to ordinary appeal before a district court or a regional court, respectively. The relevant appeal decisions were not amenable to ordinary appeals and thus were to be treated as having "entered into force".

At the material time, the CAO did not contain a provision concerning time-limits for seeking supervisory review. As specified by the Plenary Supreme Court in 2003, the provisions on time-limits under the Code of Civil Procedure were not applicable in respect of administrative offence cases examined since 2002 under the CAO.

Although parties to proceedings had a direct right to seek supervisory review before the regional court and/or Supreme Court, the CAO did not specify the scope of review and the grounds for such review. In addition, the CAO did not set any specific time-limits for challenging supervisory decisions issued at the regional level.

While the Constitutional Court did require that supervisory review be limited to "correction of judicial errors", and should not coincide with the scope of review by lower courts, the CAO itself did not clearly delimit the scope of powers held in this procedure by the (deputy) president of the court.

59. In view of the above, the Government concluded that the appeal decision issued by the district court should be treated as the "final" decision for the purpose of the six-month rule under Article 35 of the Convention.

60. The Government concluded that the application was belated.

(b) The applicant organisation

61. The applicant organisation made no specific comment concerning the six-month issue.

2. The Court's assessment

62. The Court observes that the applicant organisation lodged this application more than six months after the appeal decision dated 27 December 2007 or the date on which it was able to receive a copy thereof. However, each of the two decisions at supervisory-review level (dated 29 January and 19 June 2008) and the decision of the Constitutional Court (dated 25 December 2008) were taken and, a fortiori, received by the applicant within the six-month time-period. The question before the Court is

whether any of these proceedings should be accepted for the purpose of applying the six-month rule contained in Article 35 § 1 of the Convention.

63. The Court reiterates that the primary purpose of the six-month time-limit provided for by Article 35 § 1 of the Convention is to maintain legal certainty by ensuring that cases raising issues under the Convention are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 39, 29 June 2012). This time-limit also affords the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised, and facilitates the establishment of the facts in a case, since with the passage of time any fair examination of the issues raised is rendered problematic (ibid.). The Court may only deal with the matter within a period of six months following the "final decision" at domestic level. Such a "final decision" is taken following exhaustion of the effective and available domestic remedies, namely those which were accessible, capable of providing redress in respect of the applicant's complaints, and offered reasonable prospects of success (see *Akdivar and Others v. Turkey*, judgment of 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV).

64. Various defects in the domestic procedure may indicate that decisions taken in that procedure would not be taken into consideration for the purpose of applying the six-month rule. For instance, remedies which have no time-limits, thus creating uncertainty and rendering nugatory the six-month rule contained in Article 35 § 1 of the Convention, are not effective remedies within the meaning of Article 35 § 1 (see *Galstyan v. Armenia*, no. 26986/03, § 39, 15 November 2007, and *Berdzenishvili v. Russia* (dec.), no. 31697/03, ECHR 2004-II (extracts)).

65. It is noted that the applicant organisation challenged the court decisions in the CAO case before courts at higher levels of jurisdiction.

66. According to the Court's established case-law, an application for supervisory review in civil proceedings did not constitute a remedy under Article 35 § 1 of the Convention (see *Tumilovich v. Russia* (dec.), no. 47033/99, 22 June 1999, and *Denisov v. Russia*, (dec.), no. 33408/03, 6 May 2004). In the *Martynets* case ((dec.), no. 29612/09, 12 December 2008), where the Court examined the supervisory-review procedure which was in force between January 2008 and January 2012, it found that this procedure continued to leave binding judicial decisions open to indefinite challenge, thus generating unacceptable uncertainties as to the final point in the domestic litigation. The Court reached this conclusion notwithstanding the tangible changes brought to this procedure, such as the reduction of the time-limit for lodging a supervisory review application from one year to six months, the introduction of an obligation of prior exhaustion of ordinary avenues of appeal, and the abolition of the essentially unfettered

discretionary power of the presidents of the regional courts to overrule decisions by their judges dismissing such applications. In particular, the Court criticised the maintaining of several consecutive judicial instances of supervisory review at both regional and federal level, the existence of an overall six-month time-limit open to differing interpretations, and not least the powers of the President or Deputy President of the Supreme Court to reverse any decision by a judge of the same court dismissing a supervisory review application (see *Martynets*, cited above).

67. The Court has recently taken a different view concerning the cassation appeal procedure in force since January 2012 under the Code of Civil Procedure (see *Abramyan and Others* (dec.), nos. 38951/13 and 59611/13, 12 May 2015).

68. As to criminal proceedings, in *Berdzenishvili*, cited above, the Court considered that an application for supervisory review under the Russian Code of Criminal Procedure was not a remedy under Article 35 § 1 of the Convention. The Court noted the absence of any time-limit for seeking and carrying out such a review. Furthermore, if the Presidium of a Regional Court dismissed a supervisory-review complaint it could be re-submitted to the Supreme Court. Where a judge refused to transfer a supervisory-review complaint to a supervisory-review court, the president of the court could intervene and overrule the judge's decision. Exercise of these rights was also not subject to a time-limit. The Court subsequently confirmed this approach (see, among others, *Krasulya v. Russia*, no. 12365/03, § 29, 22 February 2007).

69. Turning to the present case, the Court notes that the proceedings at issue concerned administrative offences and were governed, as regards both substance and procedure, by the provisions of the CAO, as in force before legislative amendments in 2008.

70. The Court also notes that the applicant organisation lodged supervisory-review complaints first before the Regional Court and then before the Supreme Court of Russia. Both complaints were examined on the merits and rejected.

71. First, the Court notes that under the CAO a prosecutor had the competence to institute administrative offence proceedings for a number of offences, but also had the right to institute administrative offence proceedings in any other case. He could participate in the examination of the case, could make representations, and could give a report on various issues arising in the case. He could also appeal against the decision in the case, irrespective of whether he had previously participated in the proceedings. The CAO gave a regional prosecutor or his or her deputy, the Prosecutor General or his or her deputy the right to seek supervisory review of the decision on the administrative offence.

72. In the circumstances of the present case, the proceedings were instituted by the Electoral Committee. The applicant organisation was the

only party to the proceedings at all the levels of jurisdiction, and was the one who sought supervisory review. No prosecutor played any part in the proceedings whatsoever. It has not been suggested, and the Court finds no reason to consider, that following determination of the applicant organisation's supervisory-review applications it remained open to a prosecutor to lodge, at any time, a new application for review.

73. Second, it appears that the supervisory-instance courts were, in principle, empowered to deal with the substance of the relevant Convention issue, including the assessment of the pertinent factual and legal elements.

74. Third, as regards the relief, the Court finds that the supervisory-review court was empowered not only to uphold the lower courts' decisions but also to vary them, thus putting an end to the proceedings, and to overturn those decisions with or without ordering a re-examination of the case by the lower courts.

75. Fourth, the Court notes that, as with the criminal procedure examined in *Berdzenishvili v. Russia* (see also *Kashlan v. Russia* (dec.), no. 60189/15, 19 April 2016), the CAO provided no details about any time-limit for seeking supervisory review at the material time. The Court reiterates in this connection that the absence of time-limits for using a remedy creates uncertainty, and in principle renders nugatory the six-month rule contained in Article 35 § 1 of the Convention (see *Galstyan*, § 39, and *Berdzenishvili*, both cited above).

76. However, in 2006 the Constitutional Court issued a decision in which it stated that pending a legislative amendment of the CAO courts of general jurisdiction were to refer to the similar provisions contained in the Code of Commercial Procedure (CComP) in relation to the supervisory review procedure for commercial cases, including administrative offence cases against legal entities and entrepreneurs (see paragraph 31 above). Under the CComP an application for supervisory review was to be lodged within three months of the date when the last impugned judgment entered into force. It notes in this connection that the Court agreed in 2009 that the supervisory-review procedure under the CComP (which remained in force until August 2014) had the status of a remedy in commercial cases (see *Kovaleva and Others v. Russia* (dec.), no. 6025/09, 25 June 2009).

77. The Court observes that the 2006 decision by the Constitutional Court was published and thus was accessible to all concerned, including parties to CAO proceedings and the courts, who were to rely on it as the applicable law. The Court also notes that, as transpires from a number of court decisions issued on the regional level in more recent years, following the legislative reform in December 2008 entailing the deletion of Article 30.11 that was at the heart of the 2006 constitutional decision, this decision was no longer applied by the courts since the amended review procedure became based on the new Article 30.12 of the CAO. The review procedure after 2008 falls outside the scope of the present case and thus the

Court does not need to enquire any further whether this amended procedure was a remedy to be exhausted within the meaning of Article 35 § 1 of the Convention.

78. In view of the above considerations, it should be concluded that at the material time, that is in 2007 and 2008, there existed a three-month time-limit for making use of the supervisory review procedure under the CAO (compare *Kashlan*, cited above).

79. Given that the supervisory-review proceedings were launched within a period of time that corresponded to the three-month time-limit mentioned in the CComP, that these proceedings remained within the same chain of domestic remedies, and that these proceedings were, in principle, capable of dealing with the substance of the relevant Convention issue and to afford adequate redress, the Court accepts that the applicant organisation could reasonably count in 2008 on the effectiveness of this remedy before lodging an application before the Court and was required to pursue this remedy before lodging an application before the Court.

80. Therefore, the Court will take into account the supervisory-review decision taken by the regional court on 29 January 2008 for the purpose of applying the six-month rule, and concludes that the applicant organisation has thus complied with this rule.

81. There is therefore no need to question further the role of the second round of supervisory proceedings or the Constitutional Court's decision for these purposes.

82. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

83. The Government submitted that both Article 10 of the Convention (in referring to "duties and responsibilities" as well as to formalities, conditions and penalties) and the domestic law permitted the State to put in place a framework containing the procedure of and conditions of the information flow. While Article 10 of the Convention included the freedom to impart information, Russian law provided for constitutional "freedom of mass information" along with the freedom of expression and freedom of thought. The Constitutional Court also recognised a higher degree of responsibility relating to the exercise of the freedom of mass information on a professional scale.

84. In the context of electoral campaigns, Russian law drew a distinction between providing information to the public (the voters) and "campaigning" (electioneering). While the federal legislation acknowledged the right to carry out "campaigning" for citizens and non-governmental organisations, the mass media had the function of providing information without engaging in "campaigning", which is not subject to the requirement of objectivity. The distinction between "campaigning" and information for voters served the purposes of ensuring free expression of the voters' will and transparency of the elections.

85. "Campaigning" was clearly defined as activities (i) by a candidate herself or an election group, conducted themselves or through others, (ii) aimed at inducing voters to vote for or against a candidate or a group; (iii) during an election campaign or, if via broadcast or print media, within the twenty-eight days preceding election day. The applicable laws listed specific types of situation amounting to "campaigning", including calls to vote for or against a candidate. It was incumbent on the courts to determine the direct and immediate aim of "campaigning" rather than a mere aim of providing information.

86. "Campaigning" was considered an unlawful activity if carried out by the mass media. It was not necessary to establish whether such an activity had indeed induced or could induce voters to vote one way or another. The Government argued in substance that the rule which was applied to the applicant organisation was related to political advertising. Thus, the national authorities had a wide margin of appreciation, as with the regulation of commercial advertising.

87. During the relevant period the applicant organisation had issued two publications contributing to the creation of a negative view of one of the candidates in the State Duma election. According to the Government, the "campaigning" aim of the impugned and other publications was demonstrated by the following: the underlying idea of presenting effects of the same person "holding the reins of power"; a pattern of consistently negative assessment, over a period of time, of one candidate's activities; the regional branch of the Communist Party was one of the two founders of the newspaper; the applicant organisation had expressed to the Electoral Commission its intention to accept proposals for publications for a fee and, as required by the law, had published the fees applicable to publications on behalf of political parties; the applicant organisation had signed a contract with the Communist Party for this purpose, and some of the publications in the applicant organisation's newspaper during the electoral campaign had indeed mentioned the Party's sponsorship (see paragraph 7 above). In the Government's view, the above convincingly confirmed the applicant organisation's intention to engage in "campaigning" during the election campaign. The impugned publications also fell within the scope of the "campaigning" criteria set out in 1999 by the Journalists' Union of Russia

to identify "campaigning" aims in the activities of the mass media: dissemination of adverse information without taking adequate measures to verify it approaching the person referred to; blurring of the line between opinions and established fact; violation of the Declaration of Principles on the Conduct of Journalists, including reporting only in accordance with facts of which the journalist knows the origin, the use of fair methods to obtain information, and doing the utmost to rectify any published information which is found to be harmfully inaccurate.

88. The courts had given a careful assessment of the pertinent factual and legal aspects of the case, relying in particular on the Working Group report of 17 November 2007 (see paragraph 11 above). The applicant organisation had received the smallest statutory fine, which was far less harsh than a criminal penalty, such as detention.

89. The administrative offence liability pursued the aim of protecting the reputations and rights of others, because "campaigning" activities which did not indicate the nature of the publication or its sponsorship could have misled voters. The applicable regulatory framework was aimed at preventing the use of print or broadcast media for campaigns against candidates. Such practices would violate both the rights of other candidates who respected the expenditure rules, and the rights of voters.

(b) The applicant organisation

90. The applicant organisation submitted that the ambiguity of the distinction between acceptable information for voters and "campaigning" allowed for a selective application of the legislative framework to spur opposition, in particular by way of administrative offence liability for non-compliance with the special rules relating to "campaigning". The impugned publications contained critical assessments of Mr S.'s record as regional governor, including during the election campaign in 2007. During this campaign, he had not taken temporary leave from the office of governor while leading the list of candidates for his political party. Therefore, there had been no reason for an electoral bloc or a party to pay for such publications.

(c) Third-party submissions

91. The joint submissions made by the Media Legal Defence Initiative (London, United Kingdom) and the Mass Media Defence Centre (Voronezh, Russia) may be summarised as follows. The media in the United Kingdom, France and Germany are subject to laws of general application, including in times of elections.

92. State regulation of the print media in the UK is essentially limited to laws that restrict content (defamation, privacy and contempt of court), while self-regulation is done via the Press Complaints Commission. The print media are not required to be neutral or objective in their reporting, being

free to express a political preference and criticise policies. State regulation of the broadcast media is implemented through legislative acts, including certain electoral laws.

93. While the broadcast media are generally required to be objective in their reporting at election time, the print media are under no such requirement, being free to express a political allegiance.

2. The Court's assessment

(a) Existence of an interference and its scope

94. The Court notes that the applicant organisation was fined for committing the administrative offence that was defined as a violation of the "procedure" applicable to media work during one part of an election period, namely during the month preceding election day (see paragraph 38 above). This violation concerned the failure to indicate the name of the political party or the candidate to the State Duma who had commissioned two publications in the newspaper, with or without paying a fee. This requirement became incumbent on the editorial board of the newspaper (the applicant organisation) as the content of the impugned publications contained "campaigning material". The publications were classified as "campaigning" because they were considered to predominantly contain information about one candidate in combination with negative comments.

95. It follows that the "interference" in the present case arose from the classification of the material published by the applicant organisation as "campaigning material"; this was the main element underlying the imposition of the fine. Therefore, the present case relates to the domestic distinction between "information" and "campaigning" in so far as this distinction affects the activities of the print media such as the applicant organisation during the "campaigning" period of the elections, and the statutory requirement for an editorial board to indicate the sponsorship of a publication with possible administrative offence liability in default.

96. It is uncontested that the applicant organisation's freedom of expression guaranteed under Article 10 of the Convention was interfered with by the domestic courts' decisions imposing a fine on the applicant organisation. For its part, the Court considers that there was an "interference". Indeed, although the applicant organisation was not the author of the contested articles, it participated in their dissemination by publishing and distributing them. The Court reiterates in this respect that publishers, irrespective of whether they associate themselves with the content of publications, play a full part in the exercise of freedom of expression by providing authors with a medium (see *Editions Plon v. France*, no. 58148/00, § 22, ECHR 2004-IV; and *Andrushko v. Russia*, no. 4260/04, § 42, 14 October 2010). Having regard to the scope of the "interference" and the arguments before it, the Court considers that the

present case relates to the applicant organisation's exercise of freedom to impart information and ideas.

97. The Court's task in the present case is to assess whether the interference thus defined was compatible with the Convention. This interference will be in breach of Article 10 of the Convention unless it is "prescribed by law", pursued one or more legitimate aims listed in Article 10 § 2, and was "necessary in a democratic society".

(b) Lawfulness

98. The Court reiterates that the expression "prescribed by law" in the second paragraph of Article 10 requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see, among other authorities, *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V, and *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I). The level of precision required of domestic legislation – which cannot provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover, and the number and status of those to whom it is addressed (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 142, ECHR 2012). The applicant organisation's conviction had its basis in Article 5.5 of the Code of Administrative Offences taken in conjunction with sections 45 and 52 of the Electoral Rights Act of 2002 and section 55 of the State Duma Deputies Election Act of 2005. The applicant organisation mentioned the ambiguity of the notion of "campaigning" as distinguished from the notion of "information for voters". The Court does not find it necessary in the present case to take any stance on the question of lawfulness, in view of its conclusion below regarding proportionality (see paragraph 134 below). In any event, it will take up the relevant matters below in the context of an analysis of proportionality, in particular as regards the classification of the impugned publications as "campaigning material" and the related administrative offence proceedings against the applicant organisation.

(c) Legitimate aim(s)

99. Next, the Court has to ascertain whether the "interference" complained of pursued a legitimate aim. It appears to be common ground between the parties that the "interference" in respect of the applicant organisation's freedom of expression was aimed to pursue the legitimate aim of protecting the "rights of others". The Government contended that the "others" in question were other candidates who respected the rules, and voters who might be misled if it were not clear who had sponsored campaigning activities (see paragraph 89 above).

100. It has not been concluded at the domestic level that the "negative comments" in the impugned publications amounted to an affront to Mr Stroyev's dignity, good name or reputation, which would normally be protected within the scope of an action for defamation. Further, the Government do not suggest that the interference pursued the aim of protecting Mr Stroyev's reputation, and the domestic court decisions contain no specific assessment of any such comments. Accordingly, as the aim of the interference in the present case was not to protect Mr Stroyev's reputation, the circumstances of the case do not turn on the balancing exercise between the rights and freedoms under Articles 8 and 10 of the Convention.

101. At the same time, it is noted that the requirement to indicate the sponsorship of published "campaigning material" was one of the checks and balances which make up Russian law in relation to election procedures, including the regulations relating to mass media work during elections.

102. The present case arises from interference with freedom of expression, which is protected under Article 10 of the Convention, and not a complaint brought under Article 3 of Protocol No. 1 to the Convention. From this perspective, since the circumstances of the case relate to the parliamentary elections so that the "choice of the legislature" was at stake, it is appropriate to consider the applicant organisation's right to freedom of expression under Article 10 of the Convention in the light of Article 3 of Protocol No. 1 to the Convention, which provides as follows:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

103. In previous cases the Court has considered that the balancing exercise could take account, under the heading of the "rights of others", of the general public interest, for instance relating to absence of distortion of the electoral process, including fair competition between the candidates (see also *Erdoğan Gökçe v. Turkey*, no. 31736/04, § 40, 14 October 2014, and *Animal Defenders International v. the United Kingdom* ([GC], no. 48876/08, §§ 78, 99 and 112, ECHR 2013 (extracts)). It may be legitimate that certain formalities, restrictions or penalties may be called for during an election period, for instance to ensure a level playing field, for example by way of regulating and controlling campaign expenditure. This might be relevant where certain candidates or parties, because of their relative financial strength, might have obtained an unfair advantage over those with less resources by being able to spend more, for instance on political advertising (see *TV Vest AS and Rogaland Pensjonistparti v. Norway*, no. 21132/05, § 72, ECHR 2008 (extracts), and *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, § 75, ECHR 2001-VI).

104. It follows from the constitutional rulings of 30 October 2003 and 16 June 2006 (see paragraphs 44 and 51 above) that the applicable

provisions of the Electoral Rights Act of 2002 were aimed at transparency of elections, including campaign finances, as well as at enforcing the voters' right to impartial, truthful and balanced information via mass media outlets and the formation of their informed choices in an election. The Court will take it into account as a legitimate aim.

105. The Court will next examine whether the restrictions in question were "necessary" in the pursuit of that aim.

(d) Necessary in a democratic society

(i) General principles

106. The general principles concerning the question whether an interference with freedom of expression is "necessary in a democratic society" are well established in the Court's case-law and have been summarised as follows (see *Animal Defenders International*, cited above, § 100, with further references):

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it 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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

107. The breadth of the margin of appreciation to be afforded to domestic authorities depends on a number of factors, such as the type of the expression at issue. There is little scope under Article 10 § 2 for restrictions

on debates on questions of public interest (see *Animal Defenders International*, cited above, § 102). The margin is also narrowed by the strong interest of a democratic society in the press exercising its vital role as a public watchdog: freedom of the press and other news media affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. It is incumbent on the press to impart information and ideas on subjects of public interest and the public also has a right to receive them (ibid.).

108. The press fulfils an essential function in a democratic society. Although the press must not overstep certain bounds, particularly as regards the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its duties and responsibilities – information and ideas on all matters of public interest (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298; *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, Reports 1997-I; and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III).

109. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 38, Series A no. 313, and *Bladet Tromsø and Stensaas*, cited above, § 59). By reason of the "duties and responsibilities", which are 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 *Bladet Tromsø and Stensaas*, § 65, cited above, and *Alithia Publishing Company Ltd and Constantinides v. Cyprus*, no. 17550/03, § 65, 22 May 2008). The methods of objective and balanced reporting may vary considerably, depending among other things on the media in question; it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists (see *Jersild*, cited above, § 31). In considering the "duties and responsibilities" of a journalist, the potential impact of the medium concerned is an important factor; audiovisual media often have a much more immediate and powerful effect than print media (see *Purcell and Others v. Ireland*, no. 15404/89, Commission decision of 16 April 1991, Decisions and Reports 70). For instance, the Court noted the differences between a portal operator and a traditional publisher and a certain development in favour of distinguishing between the legal principles regulating the activities of the traditional print and audiovisual media on the one hand and Internet-based media operations on the other (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 113, ECHR 2015).

110. The Court also reiterates that the rights guaranteed by Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 58, ECHR 2005-IX). Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 47, Series A no. 113, and the *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, §§ 41–42). The two rights are inter-related and operate to reinforce each other: for example, 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" (see *Mathieu-Mohin and Clerfayt*, cited above, § 54). 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. In the context of election debates, the unhindered exercise of freedom of speech by candidates has particular significance (see *Kudeshkina v. Russia*, no. 29492/05, § 87, 26 February 2009).

111. In certain circumstances the rights under Article 10 of the Convention and Article 3 of Protocol No. 1 may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the "free expression of the opinion of the people in the choice of the legislature". In *Mathieu-Mohin and Clerfayt*, cited above, §§ 52 and 54, the Court recognised that the Contracting States have a wide margin of appreciation with regard to their electoral systems. Referring to this, in *Bowman* (cited above, § 43) the Court stated that, in striking the balance between the rights under Article 10 of the Convention and Article 3 of Protocol No. 1, the Contracting States have a margin of appreciation, as they do generally with regard to their electoral systems. More recently, in a case concerning advertisement of a political nature, the Court stated that the political nature of the advertisements that were prohibited called for strict scrutiny and a correspondingly circumscribed national margin of appreciation with regard to the need for the restrictions. The Court did not find it appropriate in that case to attach much weight to the various justifications for allowing States a wide margin of appreciation with reference to Article 3 of Protocol No. 1 to the Convention. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the privileged position of free political speech under Article 10 of the Convention (see *TV Vest AS and Rogaland Pensjonistparti*, cited above, §§ 64 and 66).

112. Lastly, the Court reiterates that it is not for it to express a view on the appropriateness of the methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether

the methods adopted and the effects they entail are in conformity with the Convention (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 67, ECHR 2004-I).

113. The Court also made the following findings in *Animal Defenders International* [internal references omitted], which are of relevance in the present case:

> "106. ... It is recalled that a State can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases ...
>
> 108. It emerges from that case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it ... The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation ... It is also relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess ... A general measure has been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty as well as of discrimination and arbitrariness ... The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality ...
>
> 109. It follows that the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case ...
>
> 110. The central question as regards such measures is not ... whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it ...
>
> 111. ... While the risk to pluralist public debates, elections and the democratic process would evidently be more acute during an electoral period, the *Bowman* judgment does not suggest that that risk is confined to such periods since the democratic process is a continuing one to be nurtured at all times by a free and pluralist public debate ...
>
> Accordingly, it is relevant to recall that there is a wealth of historical, cultural and political differences within Europe so that it is for each State to mould its own democratic vision ... By reason of their direct and continuous contact with the vital forces of their countries, their societies and their needs, the legislative and judicial authorities are best placed to assess the particular difficulties in safeguarding the democratic order in their State ... The State must therefore be accorded some discretion as regards this country-specific and complex assessment which is of central relevance to the legislative choices at issue ..."

(ii) Application of the principles in the present case

(α) Margin of appreciation

114. Having delimited the scope of the case before it (paragraphs 94-96 above) and bearing in mind the legitimate aim sought to be pursued

(paragraph 104 above), the Court will now turn to the question of the margin of appreciation retained by the respondent State in putting in place the impugned regulations and for interfering with the applicant's freedom protected by Article 10 § 1 of the Convention.

115. The Court has taken note of the Government's argument about the wider margin of appreciation retained by the States in putting in place regulations on elections and when interfering with rights under Article 3 of Protocol No. 1 and in relation to commercial matters or political advertising (see paragraph 86 above). However, the present case concerns the "interference" within the meaning of Article 10 § 2 of the Convention, arising in the area of political expression in the time of elections. The publications were related to the applicant's exercise of its freedom to impart information and ideas, and the content of the publications was part of the normal journalistic coverage of a political debate in the print media, in view of the Court's findings in the following paragraphs. Therefore, it is not pertinent to refer to the Court's case-law relating to political advertising, in television broadcasting or otherwise (see *TV Vest AS and Rogaland Pensjonistparti*, cited above, §§ 64 and 67), or the case-law concerning publications within the commercial context of product marketing, an area in which States have traditionally enjoyed a wider margin of appreciation (see *Ärztekammer für Wien and Dorner v. Austria*, no. 8895/10, §§ 65-66, 16 February 2016).

116. Thus, there was little scope for restrictions, especially on account of the strong interest of a democratic society in the press exercising its vital role as a public watchdog (see the cases cited in paragraphs 107-108 above).

(β) Whether the respondent State acted within its margin of appreciation and in compliance with the principle of proportionality

117. The Government's central argument was that the regulatory framework was acceptable because for a period during the electoral campaign it was obligatory for the print media to demonstrate a degree of neutrality and objectivity in their coverage of the election. The applicant organisation argued in reply that the "campaigning" regulations entailed an excessive restriction on public debate in the print media during the election period.

118. The Court takes note of the Russian legislature's choice of preventing mass media outlets from participating on their own in "election campaigning", that is from acting in a way intended to induce voters to vote for or against a candidate or a political party. The legislation covers articles, such as that in the present case, which focus predominantly on one person in combination with commentaries. It is also noted that the Russian legislature put in place a regulatory framework aimed at defining the scope of the media's work during elections and providing for penalties for related breaches.

119. At this juncture the Court finds it necessary to deal with the Government's submission before the Court that may be understood as suggesting that the applicant organisation was an affiliated partisan mass media outlet that published a periodical whose stance was invariably prejudiced against the United Russia Party, and that the impugned articles were "campaigning material" commissioned by Mr Stroyev's opponents, meaning the Communist Party or its regional branch.

120. While taking note of the applicant's Articles of incorporation (see paragraph 6 above), the Court is not satisfied that there is enough to substantiate that the editorial decisions were in fact taken by the Communist Party or its local branch (compare *Saliyev v. Russia*, no. 35016/03, §§ 52-53 and 62-70, 21 October 2010). It has not been substantiated that the impugned publications were (paid-for) political advertisements, rather than "ordinary" journalistic work. There is no proof that any related arguments were raised and examined in the domestic proceedings, in particular in relation to ascertaining the presence of a campaign aim or other essential elements of the offence. It follows from the available material that the applicant organisation clearly specified on the front page of the periodical its formal affiliation to a political party (the Communist Party) and also clearly declared its readiness to publish material on the part of any political party, electoral bloc or candidate in a specific election. While it is true that it declared that the fees it announced would not "apply to the newspaper's founder", as a matter of fact, the same fee was charged to the Communist Party. Nothing in the domestic proceedings or before the Court discloses that the impugned articles were among those mentioned in the contract between the application organisation and the local branch of the Communist Party.

121. The Court has no reason to consider that any candidates or political parties were at the origin of the impugned articles (see, by comparison, *Andrushko*, cited above, § 45, where a candidate published a leaflet concerning another candidate). Therefore, the Court concludes that the publication of the impugned articles by the applicant organisation constituted a fully-fledged exercise of its own freedom of expression, namely the choice to publish the articles, thus imparting information to the readers and potential voters (see *Długołęcki v. Poland*, no. 23806/03, § 42, 24 February 2009).

122. Bearing in mind the approach outlined in *Animal Defenders International*, cited above, §§ 106-11, the Court will consider whether the above regulatory framework and the effects it entailed in the present case were in conformity with the Convention (see also *Gorzelik and Others*, cited above, § 67).

123. The Court has had the benefit of reading the Russian Constitutional Court rulings of 30 October 2003 and 16 June 2006, its decision of 25 December 2008 on the applicant organisation's application, and a

number of other decisions. This Court has carefully examined the reasoning put forward by the Russian Constitutional Court to justify the distinction between "information" and "campaigning" and, foremost, for restricting the activity of mass media outlets during an election campaign.

124. It transpires from the constitutional ruling of 16 June 2006 (see paragraph 51 above) that the regulatory framework was meant to "take account of the historical conditions that prevail[ed] at a particular stage of the country's development" when "the need to ensure transparent financing of elections required reinforced safeguards", "also taking into account the [then] current realistic possibility of control over the financing of elections". Judge Kononov, in his separate opinion to the ruling of 30 October 2003, suggested that the exclusion of mass media outlets from engaging in election campaigning might be aimed at dealing with the issue of "black PR" (see paragraph 48 above).

125. The Court reiterates in this connection that by reason of their direct and continuous contact with the vital forces of their countries, their societies and their needs, the legislative and judicial authorities are best placed to assess the particular difficulties in safeguarding the democratic order in their State (see *Animal Defenders International*, cited above, § 111). The State must therefore be accorded some discretion as regards this country-specific and complex assessment which is of central relevance to the legislative choices at issue (ibid.). However, neither the above rulings themselves nor the Government in the present case developed this line of argument, in particular to demonstrate how the special regulations in questions related to and actually addressed the situation mentioned in paragraph 124 above in a proportionate manner while being "necessary in a democratic society".

126. The Court has at its disposal no information relating to the quality of the parliamentary review of the necessity of the special regulatory framework, to enable the Court to ascertain the operation of the relevant margin of appreciation.

127. As to the practical implications of the special regulations on the freedom of expression, as the Constitutional Court admitted, despite their formal distinction both information and campaigning could induce voters to make a certain choice; the only criterion to distinguish between them would be the existence of a particular campaign aim, namely to incline the voters to support or oppose a certain candidate (see paragraphs 23 and 44 above).

128. In the Court's view, while it may be desirable, for the sake of the "free expression of the opinion of the people in the choice of the legislature" or another legitimate and compelling consideration, for publications to contain a review of several candidates or parties or their programmes, it is difficult if not impossible to ascertain whether the content in relation to a candidate should be perceived as a mere "negative comment" or whether it had a "campaigning" goal. The domestic regulative framework restricted the activity of the print media on the basis of a criterion that was vague and

conferred a very wide discretion on the public authorities that were to interpret and apply it.

129. Foremost, it has not been convincingly demonstrated, and the Court does not find sufficient basis for upholding the Government's argument, that the print media should be subjected to rigorous requirements of impartiality, neutrality and equality of treatment during an election period (see the findings of the Venice Commission and the Council of Europe Committee of Ministers in paragraphs 52-54 above).

130. In the Court's opinion, at election time the press assists the "free expression of the opinion of the people in the choice of the legislature". The "public watchdog" role of the press is no less pertinent at election time (see the cases cited in paragraphs 107-108 and 110 above). This role is not limited to using the press as a medium of communication, for instance by way of political advertising, but also encompasses an independent exercise of freedom of the press by mass media outlets such as newspapers on the basis of free editorial choice aimed at imparting information and ideas on subjects of public interest. In particular, discussion of the candidates and their programmes contributes to the public's right to receive information and strengthens voters' ability to make informed choices between candidates for office (ibid.).

131. Having said this, it remains the case that both during and outwith an election period, the print media's activity is subject to the requirement to act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see the cases cited in paragraph 109 above) and considerations relating to certain boundaries, particularly as regards the reputation and rights of others and the need to prevent the disclosure of confidential information. In this connection, the assessment of impugned publications should, as it is for instance in defamation cases, be subject to the traditional criteria under Article 10 of the Convention, including the distinction to be drawn between statements of fact and value judgments (see, as a recent authority, *Morice v. France* [GC], no. 29369/10, § 126, 23 April 2015).

132. Unfavourable publications before election day (several weeks before it, as in the present case), indeed, could be damaging to one's reputation. However, this was not the stated concern of the impugned legislation (see also paragraph 104 above concerning the "legitimate aim" pursued). The focus of the domestic legislation was not on the falsity or truth of the content or its defamatory nature, but on the presence of the special goal pursued. Besides, any damage caused to reputation could be addressed, possibly before election day, by way of other appropriate procedures (see also *Chemodurov*, cited above, § 20).

133. In the Court's view, the applicable regulatory framework excessively and without compelling justification reduced the scope for press expression by restricting the number of participants and impinging upon the

applicant organisation's freedom to impart information and ideas during the election period and was not shown to achieve, in a proportionate manner, the aim of running fair elections.

(e) Conclusion

134. The Court concludes that, in view of the regulatory framework, the applicant organisation was restricted in its freedom to impart information and ideas. By subjecting the expression of comments to the regulation of "campaigning" and by prosecuting the applicant with reference to this regulation, there was an interference with the applicant organisation's editorial choice to publish a text taking a critical stance and to impart information and ideas on matters of public interest. No sufficiently compelling reasons have been shown to justify the prosecution and conviction of the applicant organisation for its publications at election time.

135. The Court concludes that there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

136. Article 41 of the Convention provides:

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

A. Damage

137. The applicant organisation claimed 10,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

138. The Government contested the claim.

139. The Court considers that there is a sufficient causal link between the violation found and the pecuniary damage alleged on account of the fine paid by the applicant organisation in the amount of RUB 35,000.

140. As to non-pecuniary damage, the Court reiterates that there is a possibility under Article 41 of the Convention that a commercial company may be awarded monetary compensation for non-pecuniary damage (see *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 35, ECHR 2000-IV). Non-pecuniary damage suffered by companies may include heads of claim that are to a greater or lesser extent "objective" or "subjective". Among these, account should be taken of the company's reputation, uncertainty in decision-planning, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of

the management team (ibid.; see also *Centro Europa 7 S.r.l. and Di Stefano*, cited above, §§ 221-22).

141. With regard to the nature of the violation found, the Court awards the applicant organisation an aggregate sum of EUR 5,500 in respect of pecuniary and non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

142. The applicant organisation made no claim under this head.

143. The Court does not find it necessary to make any award.

C. Default interest

144. 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 six votes to one, that there has been a violation of Article 10 of the Convention;

3. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicant organisation, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,500 (five thousand five hundred euros), plus any tax that may be chargeable, in respect of pecuniary and 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;

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

Done in English, and notified in writing on 21 February 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips	Luis López Guerra
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Dedov is annexed to this judgment.

L.L.G.
J.S.P.

DISSENTING OPINION OF JUDGE DEDOV

I completely agree with the analysis provided in the judgment and accepted by the majority, but, unfortunately, I cannot find any reasons to vote for a violation of Article 10 of the Convention in the present case. The fact is that the impugned articles disseminated information damaging to personal reputation, good name and dignity without a reliable factual background. In the context of the freedom of expression, the judgment, therefore, is based on the distinction between the defamation and the distortion of the competition among candidates during the electoral process (see § 132 of the judgment). On the contrary, I believe that there are key elements (respect of dignity and ethics of responsible journalism) applicable to both situations.

According to the international material presented in the judgement, there are general principles governing the role of the press during the elections. It is confirmed that the open debate of ideas is vital in a democratic system, freedom of press is vital to express opinions on candidate's programmes and to criticise public powers (Venice Commission, see § 54 of the judgment); there is an obligation on mass media coverage of electoral campaigns that is fair, balanced and impartial (Committee of Ministers, see § 52 of the judgment); it is incumbent on the press to impart information and ideas on subjects of public interest (see § 107 of the judgment).

Indeed, the majority recognised that it remains the case that "both during and outwith an election period, the print media's activity is subject to the requirement to act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism" (see § 131 of the judgment). It means that the responsible journalism is subject to certain boundaries and self-restraints (which also apply to all the other branches of power), and during the elections the media should be even more cautious because of the special role they play in society.

The legitimate aim is very important in order to understand this point. The voters expect to receive the impartial and comprehensive information necessary to make their decision in favour of a political party or a candidate. The information includes, in particular, the programmes, views and actions of political parties and candidates standing for election. The press should not confine itself to imparting such information in its efforts to organise an open debate on public issues which are vital for the social progress and further development of society.

Public debate, as a part of the decision-making process, is a cornerstone of any democratic society. Public debate enables ordinary people to participate in the political process. It is not destructive for the election (decision-making) process, provided the discussion and analysis of programmes and views lead to a better understanding of the political actions which the voters could accept as necessary and preferable. To achieve this

legitimate aim, a motivated opinion (negative or positive) should be expressed. If the interference with the freedom of expression had been exercised in relation to a fair and open debate as described above, I would vote for a violation of Article 10 without any hesitation, and I would agree, in concrete circumstances, that the Russian law lacks the legal certainty.

However, the press should not unduly influence the voters' decision on who is the more reliable candidate. It is for the public, not for the journalist, to decide who deserves to be a member of parliament or even a member of a political party (as in the present case). The worst-case scenario is when the journalist expresses an unsubstantiated value-judgment which diminishes the dignity of the candidate, as happened in the present case. Abuse of a personal nature, in my view, is always unacceptable as it distorts the fairness of the election process and unduly influences the choice between candidates. As a result of such press actions, respect for candidates as members of society is liable to be replaced by hatred, and systemic analysis by hate speech. Finally, it impedes social progress.

The Court's case-law (cited in the judgment) includes very good examples of a fair and open debate on a subject of public interest (humanism) which, to my regret, did not attract great interest. In the case of *Animal Defenders International*, the applicant organisation raised the issue of ill-treatment of animals. The *Bowman* case concerned the preferences of candidates in relation to the problem of abortion. In both cases the public had received the impartial information required for making a free choice during the elections. Surprisingly, the Court came to opposite conclusions in the two cases, and the judges of the Court were divided in their opinions.

Therefore, the case-law of the Court is still not established. Obviously, it is difficult to strike a balance between freedom of expression and the public function of the press. In my view, the financing element should be disregarded if the publication contains truthful, fair and objective information in the public interest, based, for example, on universal human values. Unfortunately, in *Animal Defenders International* the Court came to the opposite conclusion.

The present case is different: the impugned articles attacked the candidate's personality, his good name, his reputation and his dignity. They did not concern the political party's programme or the candidate's personal views on any subject of public interest. Indeed, the press has the right to criticize power, but even public officials are human beings and, in the name of fundamental rights and freedoms, their dignity should be equally protected. I must say that personal attacks are very painful, and the dignity of any person should be respected in a democratic society. Therefore, the proposal made in the judgment that the candidate could defend his good name in court is not sufficient to regulate the freedom of the press during election periods. As usually happens with the abuse of freedom of the press,

the impugned publications were not intended to impart any "information or ideas" of value to the public debate.

Finally, the circumstances of the present case do not provide the Court with an opportunity to analyse the quality of the law, including the restrictions imposed on the press with regard to pre-election campaigning. In the main argument (see § 132 of the judgment) the majority criticises the domestic legislation as not pursuing the declared legitimate aim ("the focus of the domestic legislation was not on the falsity or truth of the content ... but on the presence of the special goal pursued"). Although the Court referred to the Russian Constitutional Court's interpretation of the legitimate aim (see § 104 of the judgment), the Court did not, in fact, take it into account. Furthermore, it was incumbent on the Court to accept that the publications were not fair and objective.

At least the national authorities' decisions were compatible with the general requirements of fairness and impartiality of the press. The Electoral Committee stressed that the impugned articles had not been intended to inform the voters about the electoral campaign, but concentrated exclusively on creating a negative image of a candidate and a political party for the purposes of unduly influencing the public to vote against them (see § 11 of the judgment).