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

FIRST SECTION

CASE OF KUDESHKINA v. RUSSIA

(Application no. 29492/05)

JUDGMENT

STRASBOURG

26 February 2009

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

In the case of Kudeshkina v. Russia,

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

Christos Rozakis, *President*,
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Dean Spielmann,
Giorgio Malinverni,
George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 5 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 29492/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Ms Olga Borisovna Kudeshkina ("the applicant"), on 12 July 2005.

2. The applicant was represented by Ms K. Moskalenko, Ms A. Panicheva and Ms M. Voskobitova, lawyers practising in Strasbourg and Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev and Ms V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged that her dismissal from the judiciary, following critical statements by her in the media, violated her right to the freedom of expression guaranteed by Article 10 of the Convention.

4. By a decision of 28 February 2008, the Court declared the application admissible.

5. The Government, but not the applicant, filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1951 and lives in Moscow. At the material time she had been working as a judge for 18 years.

7. From 6 November 2000 the applicant held judicial office at the Moscow City Court.

A. The applicant's participation in the criminal case against Mr Zaytsev

8. In 2003 the applicant was appointed to sit on a criminal case concerning abuse of powers by a police investigator, Mr Zaytsev. He was accused of carrying out unlawful searches while investigating a case of large-scale customs and financial fraud involving a group of companies and, allegedly, certain high-ranking state officials.

9. In June 2003 the court, composed of the applicant as judge and two lay assessors, Ms I. and Ms D., began to examine the case. During the hearing on 26 June 2003 the court invited the public prosecutor to present evidence for the prosecution. He replied that the court had failed to ensure the attendance of the prosecution witnesses and objected to the manner in which the proceedings were being conducted. On the following day, Friday 27 June 2003, he challenged the applicant as judge on the grounds of bias which she had allegedly shown when questioning one of the victims. Other parties to the proceedings, including the victim in question, objected to the challenge. On the same day the lay assessors dismissed the challenge, following which the public prosecutor challenged both lay assessors. The parties to the proceedings objected to the challenge and it was dismissed. On the same day the prosecutor filed another challenge to the lay assessors on the grounds of bias, which was also dismissed by the applicant on the same day.

10. On Monday 30 June 2003 both lay assessors filed a motion to withdraw from the proceedings.

11. On 1 July 2003 the public prosecutor declared that the minutes of the proceedings were being kept incorrectly and requested access to the records. The court refused his motion, on the grounds that the minutes could be accessed within three days of their completion.

12. On 3 July 2003 the applicant allowed the withdrawal of both lay assessors, having found as follows:

> "At the hearing the lay assessors I and D declared their withdrawal from the proceedings, on the grounds that they were unable to participate in the examination of the case because of the [public prosecutor's] biased and discourteous behaviour towards them and due to the perverse environment at the hearing, for which he is responsible and which made them ill."

13. According to the applicant, the Moscow City Court President, Ms Yegorova, then during the proceedings called the applicant to her office and asked her about the details of the proceedings, putting certain questions regarding the conduct of the trial and the decisions on the above motions.

14. The parties disagree on the circumstances of the applicant's withdrawal from the case. According to the applicant, the Moscow City Court President removed her from sitting in the case on 4 July 2003, the day after the lay assessors' withdrawal. According to the Government, the case remained with the applicant until 23 July 2003, when it was withdrawn from her by the Moscow City Court President on the grounds that she had delayed forming a new court composition and that there was a risk of further delay in view of her request for annual leave from 11 August to 11 September 2003, filed on 22 July 2003.

15. On 23 July 2003 the Moscow City Court President assigned the case to judge M.

16. The applicant subsequently sat as a judge in several other criminal cases.

B. The applicant's election campaign

17. In October 2003 the applicant submitted her candidature in general elections for the State Duma of the Russian Federation. Her election campaign included a programme for judicial reform.

18. On 29 October 2003 the Judiciary Qualification Board of Moscow granted the applicant's request for suspension from her judicial functions pending the elections in which she was standing as a candidate.

19. On 1 December 2003 the applicant gave an interview to the radio station *Ekho Moskvy*, which was broadcast on the same day. She made the following statements:

> "*Ekho Moskvy* (EM): ... it has come to our knowledge that an acting judge of the Moscow City Court has expressed criticism of the existing judicial system and mentioned certain instances of pressure being exerted on the court ...
>
> Olga Kudeshkina (OK): Indeed. Years of working in the Moscow City Court have led me to doubt the existence of independent courts in Moscow. Instances of a court being put under pressure to take a certain decision are not that rare, not only in cases of great public interest but also in cases encroaching on the interests of certain individuals of consequence or of particular groups.
>
> ...
>
> EM: So what about that case in which you were confronted with such bare and ruthless pressure, what was it?
>
> OK: Some of you have probably heard about the criminal case concerning the smuggling of furniture which was subsequently sold in the large Moscow shopping centres 'Tri Kita' and 'Grand'. The damage caused by this crime, as the investigation has revealed, amounted to several million roubles. Among those who came within the sights of the investigators, led by Zaytsev, were extremely influential and prominent people. This case received great publicity after the Prosecutor General hastily

withdrew the file from the investigation unit of the Ministry of the Interior and charged the investigator Zaytsev [with abuse of official powers].

EM: So you examined Zaytsev's case, and not that of the furniture dealers?

OK: Yes, [the case] against Zaytsev. First the Moscow City Court examined the case and acquitted him. What is more, the court expressly stated in the judgment that the office of the Prosecutor General itself sometimes failed to conform to, or was in direct breach of, the law. The reputation of the Prosecutor General's Office had been publicly challenged.

EM: And the judgment was quashed, as I remember?

OK: Yes, it was. The Panel of the Supreme Court reversed the judgment and remitted it to the Moscow City Court for a fresh examination.

EM: And you received the case?

OK: Yes. The Panel of the Supreme Court in its decision indicated the points to be taken account of in the new proceedings.

EM: So far as I know you were unable to hear the case to the end ... What happened?

OK: In the course of the examination the case was withdrawn from me by the Moscow City Court President, Yegorova, without any explanation.

...

EM: What happened just before the withdrawal?

OK: During the hearing the court was considering the evidence for the prosecution and started to cross-examine the victims. However, the public prosecutor, a representative of the Prosecutor General's Office, must have reckoned that the victims' testimonies ran contrary to the prosecution's version of events. He therefore attempted to bring the proceedings to naught. In 20 years in the judiciary this was the first time that I was confronted with such behaviour ... he was trying to keep the court within the strict bounds of the questions he thought the court ought to ask the victims ... if the court went beyond these limits he started challenging the court and bombarding it with unreasoned requests.

...

EM: ... what are judges supposed to do in such a situation, when a party to the proceedings acts in breach of the law? Can you seek help, support or at least advice?

OK: Yes, the court ... could request the Prosecutor General to replace the public prosecutor on the grounds of undue conduct in the proceedings. But at that very moment the court president called me to her office.

EM: How come the court president could intervene in the proceedings?

OK: Of course she could not. Criminal procedure in Russia is adversarial; in accordance with the law the court acts neither for the prosecution nor for the defence ... Here, it was expressly brought home to me that the President of the Moscow City Court and the agent of the Prosecutor General's Office had common cause in this case.

...

EM: ... do you think this case was exceptional or is this a widespread phenomenon?

OK: No, as far as I am aware, this is not the only case where the courts of law are used as an instrument of commercial, political or personal manipulation. This is a dangerous state of affairs because no one can rest assured that his case – whether civil or criminal or administrative – will be resolved in accordance with the law, and not just to please someone ... I do realise what kind of statement I have just made. But if all judges keep quiet this country may soon end up in a [state of] judicial lawlessness."

20. On 4 December 2003 two newspapers – *Novaya Gazeta* and *Izvestiya* – published interviews with the applicant.

21. The interview with *Novaya Gazeta*, in so far as relevant, read as follows:

"... Over the past 20 years working in the courts of law I have ... dealt with various cases: civil, criminal and administrative. Having examined hundreds, if not thousands, of cases ... I have seen a bit of everything, I know the judicial system inside out. I would not have imagined anything like what happened between me and Yegorova. In Siberia, by the way, the courts are much purer than in Moscow. There you cannot imagine such brutal manipulation and would not be talking about corruption to such an extent.

...

This was not a conflict, but unprecedented pressure on justice. Yegorova called me several times, whenever the prosecutor thought that the proceedings were not going the right way; on the last occasion I was called out of the deliberations room, which is unheard of. Never in my life had I been shouted at like that. I would not have gone if I knew what I was being called for. ...

It was that conflict which made me consider changing my career, should I succeed in the elections. There is a job for me in the highest legislative body, namely the problems of justice. I doubt that any provincial courts would harbour scandals as outrageous as those in the Moscow City Court, but this a question of degree, while the problems are more general.

A judge, although defined by law as the embodiment of judicial power and independent in this capacity, in fact often finds himself in a position of an ordinary clerk, a subordinate of a court president. The mechanism of how a decision is imposed on a judge is not to contact [the judge] directly: instead, a prosecutor or an interested person calls the court president, who then tries to talk the judge into a 'right' decision, first gently, by offering advice or a professional opinion, then pushing him or her more strongly to take the 'correct' decision, that is, one that is convenient to somebody. A judge, on the other hand, is dependant on the president for the daily

basics, such as accommodation grants, bonuses, and also the distribution of cases between the judges. The president can always find a flaw in the judge's work if he or she wishes (as simple as exceeding judicial time-limits, a situation impossible to avoid in practice, given the volume of work). On these grounds the president may seek termination of the judge's office, which is decided upon by the qualification board, usually controlled by the same court bureaucrats. ... in reality a court still more often than not takes the position of the prosecution. The courts then become an instrument of commercial, political or personal manipulation.

No one can rest assured that his case – whether civil or criminal or administrative – will be resolved in accordance with the law, and not just to please someone. Today it is investigator Zaytsev, investigating the smuggling of furniture, tomorrow it may be any one of us ..."

The interview with *Izvestiya*, in so far as relevant, read as follows:

"*Izvestiya*: Why did you decide to stand for election?

OK: Looking around, one is just stunned by the lawlessness. The law applies quite strictly to ordinary people, but this is not the case when it comes to persons holding important posts. But they break the law too. I would like to participate in making laws that would provide for real independence of the judicial power ...

Izvestiya: What does the pressure look like in practice?

OK: There is a kind of consultation, legal advice, usually in cases of great public interest. Sometimes this has a healthy pretext, such as academic debate. The judge expresses his position, and the deputy president replies. The court president rarely speaks to the judges directly. Through such conventions the court administration tests each judge to see how flexible he is, so that when it comes to [the allocation of cases] they know who can be entrusted with a delicate case and whom to avoid.

...

Izvestiya: So how exactly was pressure exerted on you?

OK: The public prosecutor exerted pressure on me. You put a question to the victim, and he immediately challenges you. In 20 years of practice I have not seen anything like it. Zaytsev was accused of abuse of official powers. He carried out a search without authorisation from a prosecutor. The law allows this in urgent cases, but the investigator must report to the prosecutor within 24 hours. Zaytsev reported to the prosecutor [in time], and it was for the court to verify whether there had indeed been any urgency in conducting those searches. Therefore it was necessary to examine the criminal case files against the firms 'Grand' and 'Tri Kita' who were dealing in furniture. Through his constant objections, however, the public prosecutor would not allow the court to touch this subject ..."

22. On 7 December 2003 the general elections took place. The applicant was not elected.

23. On 24 December 2003 the Judiciary Qualification Board of Moscow reinstated the applicant in her judicial functions as of 8 December 2003.

C. The applicant's complaint about the President of the Moscow City Court

24. On 2 December 2003 the applicant lodged the following complaint with the High Judiciary Qualification Panel:

> "I request that the President of the Moscow City Court, Olga Aleksandrovna Yegorova, be charged with a disciplinary offence for exerting unlawful pressure on me in June 2003, when I was presiding in the criminal proceedings against P.V. Zaytsev. She demanded that I give an account on the merits of this case while its examination was underway, and that I inform her about the decisions the court was about to take; she even called me out of the deliberations room for that purpose. [She] insisted on removing certain documents from the case file, forced me to forge the minutes of the hearing, and also recommended that I ask the lay assessors not to turn up for the hearing. Following my refusal to bow to this unlawful pressure [she] removed me from the proceedings and transferred the case to another judge.
>
> As to the particular circumstances, they were as follows.
>
> I was appointed to examine the case against Zaytsev, and the court, acting in a bench with two lay assessors, I and D, started its examination.
>
> Having started the trial, the court questioned a number of victims. The public prosecutor who was representing the Prosecutor General's Office clearly decided that this questioning was not favourable to the prosecution and therefore did everything possible to disrupt the hearing. For no reason he challenged me as a judge, the lay assessors and the whole composition of the court. His motions were made in a manner that was humiliating, offensive and insulting to the court, and were clearly untrue. Soon after the challenge was rejected by the court, the Moscow City Court President Yegorova called me to her office.
>
> In violation of Article 120 of the Constitution and section 10 of the Law 'On the Status of a Judge in the Russian Federation', the Moscow City Court President demanded an explanation from me as to why the lay assessors and I were putting one or other question to the victims in the trial and why one or other motion by the parties was refused or accepted. In my presence the Moscow City Court President had a telephone conversation with the [First Deputy Prosecutor General], who had issued the indictment against Zaytsev. Yegorova informed [the First Deputy Prosecutor General] that the judge was being called to account with regard to what was going on in the proceedings.
>
> Back in my office I told the lay assessors what had happened. By then they were already reduced to despair by the repeated groundless objections and insulting challenges against them on the part of the public prosecutor, and they therefore considered it impossible to continue to take part in the proceedings. One of the assessors, Ms I., was seeking medical assistance for a health problem. For these reasons they decided to withdraw from the proceedings and to state frankly in their request that the reason for their withdrawal was the pressure put on them by the agent of the Prosecutor General's Office.

At the court's following meeting the lay assessors announced their withdrawal on the above grounds. Their written requests were given to me to be enclosed in the file, and the court adjourned for deliberations.

I was again called from the deliberations room by the Moscow City Court President, Yegorova. This time she demanded that I explain what we were doing in the deliberations room and what decisions we were going to take. Her main point was that there should have been no mention in the assessors' written requests that the reason for their withdrawal was pressure being exerted on the court. The Moscow City Court President also insisted on excluding from the hearing minutes any mention of the behaviour by the public prosecutor which the assessors had regarded as pressure. In essence, Yegorova was pushing me to forge the case file. Moreover, she proposed that I ensure that the assessors did not turn up for the hearing, literally 'ask them not to come to the court any more'. The aim was obvious – if the assessors [did] not appear the proceedings themselves [would] fall apart. It seemed that for some reason [she] did not want the case to continue to be examined in this composition. The unlawfulness of the Moscow City Court President's actions was obvious.

I followed none of her instructions. The lay assessors' requests were included in the file, the court allowed their withdrawal and stated that the reason for it was the pressure being applied by the Prosecutor General's Office. The hearing minutes reflected everything that happened in the proceedings.

Once I signed [the minutes] Yegorova withdrew the case from me and transferred it to another judge without stating reasons.

I consider that such acts on the part of the Moscow City Court President, Olga Alexandrovna Yegorova, are incompatible with the status of a judge and undermine judicial authority, and are thus destructive for justice, for which she must be held liable. This is what I hereby request from the High Judiciary Qualification Panel of the Russian Federation."

25. On 15 December 2003 Ms D., one of the lay assessors who had, on 3 July 2003, withdrawn from the criminal case against Mr Zaytsev, sent a letter to the High Judiciary Qualification Panel in support of the applicant:

"Further to the publication of an interview with judge Kudeshkina ... I decided to write you because I participated in Zaytsev's case as a lay assessor.

I entirely support everything judge Kudeshkina said in her interview.

During the trial the [public prosecutor] did everything to prevent the court from hearing the case. He was rude and aggressive to the court; in his interventions and requests he deliberately misrepresented what was going on in the proceedings, and he repeatedly filed objections to the court composition. These motions were made in a humiliating, even obnoxious manner. By doing so he was exerting pressure on the court, to force it to give a judgment that was convenient to him, or, alternatively, to set the court hearing at naught.

I was appalled by that, but what was my surprise when I learned about the pressure also being exerted on judge Kudeshkina by the court President!

We, the assessors, were there when, during the interval, judge Kudeshkina received a phone call from the court President to come and see her. After some time judge Kudeshkina came back, she was upset and depressed. To our question she replied that the court President Yegorova had accused her that the court was reluctant to examine the case; that the lay assessors were asking the victims the wrong questions; and that she had suggested that judge Kudeshkina arrange for the lay assessors not to appear at the court proceedings.

... On the following morning ... both Ms I. and I decided to withdraw from the proceedings.

At the start of the hearing on that day the public prosecutor, before he was called by the court, began with a motion in which he, in essence, again degraded and insulted me by repeating [a] comment made by [the victim] outside the courtroom about me ... he did not react to the reproof by the judge.

After that ... I declared that I withdrew from sitting in the proceedings on the grounds of the public prosecutor's rude and offensive behaviour, which could not be defined as anything but pressure on the court. Ms I. then withdrew as well.

Before the trial I had never met anybody [involved in the proceedings]: not the judge, not Zaytsev, not the public prosecutor, not the defence counsel; I had no personal interest in the case. The public prosecutor's behaviour was therefore inexplicable and came as a shock to me.

At about 6 p.m. judge Kudeshkina was called out from the deliberations room where the court was taking a decision. It was the court President who called her...

On the following day ... judge Kudeshkina told us that the court President had shouted at her, demanding that she refrain from enclosing [the assessors'] withdrawal requests in the file and not refer in the court's decision to the reason for the withdrawal.

Ms I. and I were shocked by what was going on. First it was the public prosecutor who put pressure on us at the hearing, and then it turned out that the [court President] joined in.

What a surprise it was when the [court's Deputy President] came into the deliberations room and started trying to persuade me and Ms I. not to comment on the public prosecutor's behaviour in the court decision, but to state in our requests and in the court decision that we withdrew on medical grounds. She said that they would invite me and Ms I. to take part in other proceedings.

Ms I. and I refused to change our requests, and after the Deputy President left the court issued the decision [to allow withdrawal] which reflected what had happened.

I have been a lay assessor before, I have taken part in several other proceedings, but this was the first time that I came across such pressure being exerted on the court.

I request you to look into the above events and to take action against the [court's President and her Deputy]."

26. On 16 December 2003 the other lay assessor who had withdrawn, Ms I., sent a similar letter to the High Judiciary Qualification Panel.

27. Similar allegations were made by Ms T., a court secretary, in a letter to the President of the Supreme Court of the Russian Federation. She related her participation in Zaytsev's case and volunteered to testify that the applicant had indeed been frequently called up by the court president and had been distressed because of the intrusion in the court proceedings. She also complained about the unacceptable behaviour of the public prosecutor, who had forced, in her opinion, the lay assessors to withdraw.

28. Following the applicant's complaint of 2 December 2003, the High Judiciary Qualification Panel appointed Mr S., a judge of the Moscow City Commercial Court, to examine the allegations against Ms Yegorova.

29. The Government submitted a copy of a report prepared by Mr S. and submitted to the High Judiciary Qualification Panel, which contained the following conclusions:

– during the hearing of the criminal case against Zaytsev the applicant herself consulted Ms Yegorova, seeking advice on the conduct of the proceedings in view of the public prosecutor's behaviour;

– further communications between the applicant and Ms Yegorova and, on another occasion, the deputy court president, took place in private and their content could not be established;

– there was insufficient evidence that Ms Yegorova exerted pressure on the applicant, since both Ms Yegorova and the deputy court president denied the allegations;

– Ms Yegorova transferred the criminal case file against Zaytsev to another judge on the grounds that Ms Kudeshkina "was unable to conduct the court hearing, her procedural acts were inconsistent, [she acted] in breach of the principle of adversarial proceedings and equality of arms, she stated her legal opinion on the pending criminal case and she attempted to seek the court president's advice on the case, and in view of the existence of confidential reports by relevant agencies to the Moscow City Court President with regard to judge Kudeshkina, in connection with the examination of Zaytsev's case and other criminal cases".

30. On 11 May 2004 the High Judiciary Qualification Panel reported to the President of the Supreme Court their findings concerning the complaint against Ms Yegorova. He decided, without elaborating on the reasons, that there were no grounds for charging Ms Yegorova with a disciplinary offence.

31. On 17 May 2004 the High Judiciary Qualification Panel decided to dispense with disciplinary proceedings against Ms Yegorova. No copy of this decision was provided to the Court. On the same day the applicant was informed by letter that her complaint against the court president had been examined and that no further action was considered necessary.

D. The applicant's dismissal from office

32. In the meantime, on an unidentified date prior to the applicant's above reinstatement in the judicial function, the President of the Moscow Judicial Council sought termination of the applicant's office as judge. He applied to the Judiciary Qualification Board of Moscow, alleging that during her election campaign the applicant had behaved in a manner inconsistent with the authority and standing of a judge. He claimed that in her interviews she had intentionally insulted the court system and individual judges and had made false statements that could mislead the public and undermine the authority of the judiciary. The applicant filed her objections.

33. The hearing before the Judiciary Qualification Board of Moscow was scheduled for 24 March 2004, but was then adjourned until 31 March 2004, at the applicant's request, on health grounds. It was subsequently adjourned for the applicant's failure to appear until 14 April 2004, then until 28 April 2004, 12 May 2004 and, finally, 19 May 2004.

34. On 19 May 2004 the Judiciary Qualification Board of Moscow examined the Moscow Judicial Council's request. The applicant was absent from the proceedings, apparently without any valid excuse. The Judiciary Qualification Board of Moscow decided that the applicant had committed a disciplinary offence and that her office as a judge was to be terminated in accordance with the Law "On the Status of Judges in the Russian Federation". The decision, in so far as relevant, read as follows:

> "During her election campaign, in order to win fame and popularity with the voters, judge Kudeshkina deliberately disseminated deceptive, concocted and insulting perceptions of the judges and judicial system of the Russian Federation, degrading the authority of the judiciary and undermining the prestige of the judicial profession, in violation of the Law On the Status of Judges in the Russian Federation and the Code of Honour of a Judge in the Russian Federation.
>
> Thus, in November 2003, when meeting with [members of her] constituency, judge Kudeshkina stated that the Prosecutor General's Office exerts unprecedented pressure on judges during examination of a number of criminal cases by the Moscow City Court.
>
> In the live broadcast of her interview with the radio station *Ekho Moskvy* on 1 December 2003, judge Kudeshkina stated that 'years of working in the Moscow City Court have led me to doubt the existence of independent courts in Moscow'; 'a judge, although defined by law as an embodiment of judicial power and independent in this capacity, in fact often finds himself in a position of an ordinary clerk, a subordinate of a court president'; 'the courts of law are used as an instrument of commercial, political or personal manipulation'; 'if all judges keep quiet this country may soon end up in a [state of] judicial lawlessness.'
>
> In the interview with the newspaper *Izvestiya* of 4 December 2003, judge Kudeshkina stated: 'looking around, one is just stunned by the lawlessness. The law applies quite strictly to ordinary people, but this is not the case when it comes to persons holding important posts. But they break the law too – although they are not

subject to liability'; 'the court administration tests each judge to see how flexible he is, so that when it comes to [the allocation of cases] they know who can be entrusted with a delicate case and whom to avoid'.

In another interview with judge Kudeshkina, published in *Novaya Gazeta* on 4 December 2003, she also stated that 'in Siberia, by the way, the courts are much purer than in Moscow. There you cannot imagine such brutal manipulation and would not be talking about corruption to such an extent'; 'I doubt that any provincial courts would harbour scandals as outrageous as those in the Moscow City Court, but this a question of degree, while the problems are more general'; 'a judge, although defined by law as an embodiment of judicial power and independent in this capacity, in fact often finds himself in a position of an ordinary clerk, a subordinate of a court president. The mechanism of how a decision is imposed on a judge is not to contact [the judge] directly, instead a prosecutor or an interested person calls the court president, who then tries to talk the judge into a 'right' decision, first gently, by offering advice or a professional opinion, then pushing him or her more strongly to take the 'correct' decision, that is, one that is convenient to somebody'; 'in reality a court still more often than not takes the position of the prosecution. The courts then become an instrument of commercial, political or personal manipulation. No one can rest assured that his case – whether civil or criminal or administrative – will be resolved in accordance with the law, and not just to please someone'.

In so doing judge Kudeshkina knowingly and intentionally disseminated in civil society false and untruthful fabrications about the arbitrariness allegedly prevailing in the judicial sphere; that, in dealing with specific cases, judges find themselves under constant and undisguised pressure exercised through the court presidents; that the court presidents pre-test to what extent one or other judge may be controlled in order to determine who could be entrusted with delivering a knowingly unjust judgment in a case; that no one can be sure that his case is examined by an impartial tribunal; that judges in fact betray the interests of justice by adopting the position of the prosecution in most cases; that a judge in this country is not independent and honest, but [is] a typical subordinate public servant; that in this country we have complete lawlessness, and judicial chaos.

The above-mentioned statements by judge Kudeshkina are clearly based on fantasies, on knowingly false and distorted facts.

However, dissemination by a judge of such information poses a great public danger because it signifies deliberate slandering of the authority of the judiciary and intentional undermining of the prestige of the judicial profession, and also promotes incorrect ideas about corrupted, dependent and biased judicial authorities in this country, which leads to the loss of public trust in the fairness and impartiality of examination of cases brought before the courts of law.

As a result, the false information imparted to civil society by judge Kudeshkina, a member of the judiciary of Russia, undermined public confidence that the judiciary in Russia are independent and impartial; consequently, many citizens were lead to believe, erroneously, that all judges in this country are unprincipled, biased and venal, that in exercising their functions they only pursue their own mercenary ends or other selfish goals and interests.

...

In support of her unsubstantiated and groundless attempts to defile the judicial system of our country, judge Kudeshkina referred [in her interviews] to the criminal case against P.V. Zaytsev, in which she had earlier acted as judge.

She referred to the same case in her complaint to the High Judiciary Qualification Panel of the Russian Federation.

...

According to the note of the President of the High Judiciary Qualification Panel (ref. no. BKK-7242/03 of 17 May 2004), the High Judiciary Qualification Panel of the Russian Federation carried out an enquiry to verify the allegations made by judge Kudeshkina in her complaint; the President of the Supreme Court of the Russian Federation concluded, on the basis of the above, that there were no grounds to grant her request.

Thus, the allegations of interference with judge Kudeshkina's exercise of judicial function have not been confirmed by the conclusions of the enquiry.

The Qualification Board of Moscow notes that judge Kudeshkina did not make these allegations during the period when she was examining the case against Zaytsev, but nearly half a year later, during and immediately after the election campaign. Therefore the Panel considers that the dissemination by judge Kudeshkina of false and untrue information is based only on her subjective conjectures and personal insinuations.

Besides, in making her statements in the media judge Kudeshkina disclosed specific factual information concerning the criminal proceedings in the case against Zaytsev, before the judgment in this case had entered into legal force.

...

[The Law on the Status of Judges in the Russian Federation and the Code of Honour of a Judge in the Russian Federation] obliged her to refrain from any public statements discrediting the judiciary and the justice [system] in general.

...

In sum, the Judiciary Qualification Board of Moscow finds the actions of judge Kudeshkina to have degraded the honour and dignity of a judge, discredited the authority of the judiciary [and] caused substantial damage to the prestige of the judicial profession, thus constituting a disciplinary offence.

In choosing the disciplinary sanction to be imposed on judge Kudeshkina the qualification board takes into account that in making her statements [she] dishonoured the judges and the judicial system of Russia; she disseminated false information about her colleagues; she traded the dignity, responsibility and integrity of a judge for a political career; demonstrated bias when hearing a case; preferred her own political and other interests to the values of justice; abused her status as a judge in propagating legal nihilism and causing irreparable damage to the foundations of judicial authority. ..."

35. The decision indicated that it could be challenged before a court within 10 days of being served.

36. The applicant applied to the Moscow City Court, contesting the decision of the Judiciary Qualification Board of Moscow.

37. On 13 September 2004 the applicant filed a request with the President of the Supreme Court to transfer her case from the Moscow City Court to another court, on the grounds that the former would lack impartiality.

38. On 7 October 2004 the Moscow City Court, composed of a single judge, began to examine the case. The applicant first challenged the judge on the grounds that he was a member of the Moscow Judicial Council and was thus directly associated with the other party to the proceedings. She further claimed that the Moscow City Court, in any composition, would lack independence and impartiality because the impugned statements were specifically concerned with that court and its President. This request was examined on the same day and was refused, on the grounds that it was not possible to transfer the case to another judge within the same court and that only a higher court was entitled to transfer the case to another court. The applicant lodged a request seeking to have the case adjourned pending the Supreme Court's decision on her request for transfer of the case; this was also refused.

39. On 8 October 2004 the Moscow City Court upheld the decision of the Judiciary Qualification Board of Moscow. It found that the applicant's statements in the media were false, unsubstantiated and damaging to the reputation of the judiciary and the authority of all law courts. It also established that the applicant had publicly expressed an opinion prejudicial to the outcome of a pending criminal case. It concluded that the applicant had abused the right to freedom of expression out of political ambition, that she had publicly denied the rule of law and that such conduct was incompatible with holding judicial office. The court dismissed the applicant's argument that the decision was taken in her absence, having found that after many adjournments she had failed to present the court with any document certifying the reasons for her absence. It also dismissed her objection that at the time of the election campaign her duties as a judge were suspended and held that, during the suspension, she was still bound by the rules of conduct applicable to judges. Concerning the applicability of the Code of Honour of a Judge in the Russian Federation, the court decided that it was in force and legally binding at the material time and could be applied in this case.

40. The applicant filed an appeal with the Supreme Court.

41. On 25 October 2004 the applicant received a letter from judge R. of the Supreme Court, informing her that transfer of the case from the Moscow City Court was refused on the grounds that it would be contrary to the rules of jurisdiction.

42. On 19 January 2005 the Supreme Court of the Russian Federation, ruling at final instance, upheld the judgment of 8 October 2004, having

reiterated the earlier findings by the Judiciary Qualification Board of Moscow and the Moscow City Court. On the question of the alleged lack of impartiality by the Moscow City Court, which considered the case at first instance, it found that the applicant had not made any relevant complaints in the proceedings before the Moscow City Court and was therefore barred from raising this objection on appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Regulations on judicial ethics and disciplinary offences

43. Law No. 3132-I of 26 June 1992 "On the Status of Judges in the Russian Federation" provides:

Section 3 Requirements applicable to a judge

"1. A judge must strictly observe the Constitution of the Russian Federation and other laws.

2. In exercising his or her powers, and also in his or her conduct outside the office, a judge must refrain from anything that would derogate from the authority of the judicial power or the dignity of a judge or cast doubts on his or her objectivity, fairness and impartiality."

Section 12.1 Judges' liability for disciplinary offences

"A judge who has committed a disciplinary offence (a breach of this Law and of the Code of Judicial Ethics to be adopted by the All-Russian Judicial Congress) may, with the exception of the judges of the Constitutional Court of the Russian Federation, receive a disciplinary penalty in the form of:

– a warning; [or]

– early termination of judicial office.

The decision to impose a disciplinary penalty must be taken by the judicial qualification board that has competence to examine the question of termination of office of a particular judge at the time of that decision.

..."

44. The Code of Honour of a Judge in the Russian Federation, as adopted by the Judicial Council of the Russian Federation on 21 October 1993 and approved by the Second All-Russian Judicial Congress in July 1993, provides:

Section 1.3 General requirements applicable to a judge

"A judge must refrain from anything that would derogate from the authority of judicial power. He or she shall not cause damage to the prestige of his or her profession in order to pursue personal ends or the interests of another person."

Section 2.5 Rules on the exercise of professional functions by a judge

"... A judge must not make any public statements, comments or press publications concerning cases under examination by a court before a final judicial decision enters into force. A judge must not publicly, outside the professional framework, challenge court judgments that have entered into legal force or the acts of his or her colleagues."

Section 3.3 Outside activities of a judge

"A judge may participate in public life so long as this does not cause damage to the authority of the court and proper discharge by the judge of his or her professional duties."

B. Termination of judicial office

45. Section 14 of the Law "On the Status of Judges in the Russian Federation" provides as follows:

"1. Judicial office may be terminated on the following grounds:

...

(7) pursuing activities incompatible with holding judicial office;"

46. The Code of Civil Procedure of the Russian Federation provides as follows:

Article 27 Civil cases falling within the jurisdiction of the Supreme Court of the Russian Federation

"1. The Supreme Court of the Russian Federation examines as a court of first instance civil cases concerning:

...

(3) contestation of decisions to terminate or to suspend the status of a judge or the status of a retired judge; ..."

47. Section 26 of the Federal Law of 14 March 2002 "On the Bodies of the Judicial Community" provided that disputes concerning the termination of the status of a judge fell within the jurisdiction of the courts of the subjects of the Russian Federation.

48. On 2 February 2006 the Constitutional Court held in its decision No. 45-O:

"Jurisdiction in cases concerning contestation of decisions by judicial qualification panels of the subjects of the Russian Federation on the termination or suspension of the status of a judge or the status of a retired judge must be determined in accordance with paragraph 1(3) of Article 27 of the Code of Civil Procedure of the Russian Federation, which provides that only the Supreme Court of the Russian Federation may examine, as a court of first instance, civil cases concerning the contestation of decisions to terminate or to suspend the status of a judge or the status of a retired judge."

C. Composition of court and assignment of cases to judges

49. The Code of Criminal Procedure of the Russian Federation provides:

Article 242
Immutability of court composition

"1. The case must be examined by one and the same judge or by a court bench in one and the same composition.

2. If one of the judges is no longer able to take part in the hearing he or she must be replaced by another judge, and the court hearing must restart from the beginning."

50. Law No. 3132-I of 26 June 1992 "On the Status of Judges" provides:

Article 6.2
Powers of court Presidents and deputy court Presidents

"1. The Court President, at the same time as exercising judicial powers in the respective court and the procedural powers conferred on court presidents by Federal Constitutional Laws and Federal Laws, carries out the following functions:

(1) organises the court's work;

...

(3) distributes duties between the President's deputies and, in accordance with the procedure provided for by Federal Law, between the judges; ..."

51. The instruction on the courts' internal document management in force at the material time provided that the court President was responsible for the court's clerical and office management.

52. As a matter of common practice, a court President distributes cases lodged with a court between the judges of that court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

53. The applicant complained that her dismissal from judicial office following her statements in the media constituted a violation of the freedom of expression provided for in Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The parties' submissions

1. Arguments by the applicant

54. The applicant complained that the decision of the Judiciary Qualification Board of Moscow to bar her from holding judicial office in view of her critical public statements was incompatible with the principles enshrined in Article 10 of the Convention. She contended that judges, like other persons, enjoy the protection of Article 10 and that the interference with her freedom of expression was not "prescribed by law", did not pursue a legitimate aim and, finally, was not necessary in a democratic society. Her submissions under these heads may be summarised as follows.

(a) "Prescribed by law"

55. The applicant alleged that the disciplinary penalty was imposed on her unlawfully. She considered that the provisions of the Law "On the Status of Judges" applied in her case were formulated in terms that were too vague to serve as legal grounds for the charges. As for the Code of Honour of a Judge, she claimed that it did not constitute legislation because it had not been lawfully adopted by the All-Russian Judicial Congress as required by the Law "On the Status of Judges", but was only approved by that body.

56. She further contested the jurisdiction of the Moscow City Court over the proceedings in which she challenged the decision of the Judiciary Qualification Board of Moscow. She invoked the provisions of the Code of Civil Procedure, which confer jurisdiction on the Supreme Court as a first-instance court in disputes concerning the contestation of a decision on termination of judicial office. She also considered it inappropriate for the Moscow City Court to examine a case concerning criticism of that same court and its president. Her requests to the Moscow City Court and the Supreme Court to have the case transferred to the Supreme Court were refused.

(b) Legitimate aim

57. The applicant claimed that, although the authorities had declared that her termination of office was necessary for "maintaining the authority and impartiality of the judiciary", this was not the true purpose of the disputed measure. She contended that the authorities were determined to demonstrate to all members of the judiciary that information concerning the irregular functioning of the judicial system must not be disclosed to the general public, in order to preserve the judicial community from any public scrutiny even in matters concerning the implementation of procedural safeguards.

58. She further submitted that judicial independence and impartiality are issues of great public concern in Russia, where citizens have little trust in courts and the judiciary. She had decided to unveil the facts of pressure exerted on court and ordinary judges because she considered that drawing public attention to the problem would serve the interests of justice and the principles of independence and impartiality better than concealing the disgraceful facts.

59. As regards the "protection of the reputation or the rights of others", the applicant contested that the reputation or the rights of the Moscow City Court President required protection in the form of disciplinary proceedings. If Ms Yegorova, or anyone else, regarded their reputation as undermined and wished to have redress they could bring civil proceedings for defamation or even request criminal proceedings for libel. However, no such claims had been lodged, and the authorities should not have substituted themselves for persons allegedly affected by the applicant's statements.

(c) "Necessary in a democratic society"

60. Finally, the applicant claimed that the impugned measure constituted a disproportionate interference with her freedom of expression and therefore could not be regarded as "necessary in a democratic society".

61. She claimed that she should not have been prevented from criticising the domestic system of justice only because she was a judge. Although she was a civil servant, she enjoyed the rights and freedoms protected in the

Convention, including those guaranteed by Article 10, just as other citizens did.

62. The applicant insisted that the statements on the basis of which she was charged with a disciplinary offence were an expression of her opinion, i.e. a value judgment, and not a statement of fact. However, she maintained that all the facts underlying her opinion were true and supported by evidence.

63. Concerning the statements that the Government claimed were "untrue facts", she pointed out that no establishment of facts as such had taken place. Her allegations of undue pressure exerted during the criminal proceedings against Zaytsev had not been subjected to an effective investigation and had not been disproved by means of adversarial proceedings. The enquiry conducted following her complaint to the High Judicial Qualification Panel had not been public and was conducted informally. Its findings could not therefore be regarded as officially established facts. In this situation the burden of proof in the proceedings before the Judicial Qualification Board of Moscow should have been discharged by the party which brought disciplinary proceedings. In other words, it was for the Moscow Judicial Council to prove that the applicant's statements were untrue. The authorities failed to discharge this burden of proof in the proceedings before the Judicial Qualification Board of Moscow or in the ensuing court proceedings.

64. As evidence of her allegations of pressure on the part of the Moscow City Court President, she referred to the statements of the lay assessors and to the arbitrary and unlawful transfer of the criminal case file from her to another judge. She claimed that the judicial authorities disregarded the evidence, notably by refusing to question the lay assessors or other witnesses, as requested by the applicant.

2. Arguments by the Government

65. The Government did not dispute the applicability of Article 10 of the Convention in the present case. They also accepted that the decision to bar the applicant from holding judicial office constituted an interference with her freedom of expression provided for in that Article.

66. However, they maintained that the interference was justified within the meaning of paragraph 2 of Article 10 of the Convention, in that it was prescribed by law, pursued legitimate aims and was "necessary in a democratic society". Their submissions under these heads may be summarised as follows.

(a) "Prescribed by law"

67. The Government considered that the applicant's status as judge had been terminated in accordance with substantive and procedural laws. They contested the applicant's argument that the Law "On the Status of Judges"

was too vague to be applied as a basis for disciplinary charges. They also maintained that the Code of Honour of a Judge was a legally binding document since its adoption, on 21 October 1993, by the Judicial Council of the Russian Federation on the basis of its approval by the Second All-Russian Judicial Congress. It ceased to have effect only on 2 December 2004, when it was replaced by the Code of Judicial Ethics adopted by the All-Russian Judicial Congress.

68. As regards the alleged lack of jurisdiction of the Moscow City Court, the Government disagreed with the applicant. They claimed that at the material time jurisdiction was determined by the Federal Law "On the Bodies of the Judicial Community", which provided that the courts of the subjects of the Russian Federation were competent to examine such claims. This changed only on 2 February 2006, when the Constitutional Court gave an interpretation in favour of the conflicting provisions of the Code of Civil Procedure. The Government pointed out that the applicant herself had filed her claim with the Moscow City Court and thus accepted its jurisdiction. Furthermore, in her requests for a transfer of the case she did not rely on the lack of jurisdiction of the Moscow City Court, but only on its alleged lack of impartiality.

(b) Legitimate aim

69. The Government maintained that the impugned measure was necessary for "maintaining the authority and impartiality of the judiciary" and for the "protection of the reputation or rights of others". The applicant's statements were damaging to the system of justice in general and promoted "legal nihilism" among the public. Moreover, she had disseminated defamatory statements against officials of the Moscow City Court and had failed to prove the alleged facts. The interests of justice and of the implicated persons, who held judicial posts, required the State to interfere and to impose sanctions on the applicant.

(c) "Necessary in a democratic society"

70. The Government claimed that the termination of the applicant's judicial office was proportionate to the pursued legitimate aim and that it corresponded to a "pressing social need". They referred to the Court's case-law, which stated that "whenever civil servants' right to freedom of expression is in issue the 'duties and responsibilities' referred to in Article 10 § 2 assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim" (the Government cited *Vogt v. Germany*, 26 September 1995, § 53, Series A no. 323). They contended that the restrictions on judges' freedom of expression had even greater importance than that of other civil servants.

Accordingly, the State must be afforded an even wider margin of appreciation in imposing and enforcing limits on judges' freedom of speech.

71. The Government considered that the disciplinary offence committed by the applicant had two separate aspects, each of which was of such gravity that it justified the disciplinary sanction imposed on her.

72. The first aspect was making statements concerning judges and the judicial system, alleging unlawful conduct by Ms Yegorova and other officials. However, in her complaint against these persons to the High Judiciary Qualification Panel she had failed to adduce sufficient proof of these facts. Consequently, these allegations could not be regarded as fair comment or justified criticism.

73. The Government argued that even if those statements were to be regarded as value judgments, they still needed to have some underlying factual ground and, in any event, should have remained within the limits compatible with the high moral standards required from judges. In the present case, the applicant went beyond what was acceptable from a civil servant, particularly a judge. Although freedom of expression was guaranteed to everyone, the rules of judicial ethics imposed certain restrictions on holders of judicial posts. The latter persons acted as guarantors of the rule of law, and it was therefore necessary to set strict limits on their permissible conduct in order to ensure the authority and the impartiality of the judiciary. Moreover, opinions expressed by a judge carried a greater danger of misleading the public because they carried greater weight than those expressed by laymen. The audience tended to trust persons with professional knowledge of the judicial system and their views were usually respected as authoritative and balanced.

74. The second aspect of the applicant's disciplinary offence consisted of the statements concerning the criminal case against Zaytsev, which at the material time was pending before the appeal instance. It was unacceptable for a judge to comment on a case under examination by a court because this encroached on the competent court's jurisdiction, independence and impartiality.

75. Replying to the applicant's argument that the interested persons should themselves have brought defamation proceedings, the Government submitted that these individuals had no personal animosity towards the applicant and did not wish to pursue any private ends by bringing such proceedings.

76. The Government further alleged that the applicant had abused her position as a judge in order to achieve her personal goals, namely to win votes from the electorate at the expense of the reputation of her colleagues and the judicial institutions. She had therefore made her allegations several months after the events at issue, at the time of the election campaign.

77. Finally, the Government contended that the choice of the disciplinary sanction was justified in view of the specific circumstances of

the case. The applicant had demonstrated her inability to comply with the requirements for holding judicial office, and therefore a measure that would have allowed her to continue working as a judge, such as a warning, would not have sufficed. Moreover, no further measures were taken against the applicant. In particular, there had been no injunction against her continuing the public debate on the subject.

78. In view of the foregoing, the Government considered that the interference with the applicant's freedom of expression was "necessary in a democratic society".

B. The Court's assessment

79. As regards the scope of this case, the Court observes, and this is common ground between the parties, that the decision to bar the applicant from holding judicial office was prompted by her statements to the media. Neither the applicant's eligibility for public service nor her professional ability to exercise judicial functions were part of the arguments before the domestic authorities. Accordingly, the measure complained of essentially related to freedom of expression, and not the holding of a public post in the administration of justice, the right to which is not secured by the Convention (see *Harabin v. Slovakia* (dec.), no. 62584/00, 29 June 2004). It follows that Article 10 applies in the present case.

80. The Court considers that the disciplinary penalty imposed on the applicant constituted an interference with the exercise of the right protected by Article 10 of the Convention. Moreover, the existence of the interference was not in dispute between the parties. The Court will therefore examine whether it was justified under paragraph 2 of Article 10 of the Convention.

1. "Prescribed by law" and legitimate aim

81. The Court notes that the applicant contested that the disciplinary penalty was "prescribed by law" and that it pursued a legitimate aim. However, in so far as she may be understood to challenge the quality of law applied in her case, the Court does not find sufficient ground to conclude that the legal acts relied on by the domestic authorities were not published or that their effect was not foreseeable. As regards her arguments relating to the unfairness of the disciplinary proceedings and the lack of impartiality of the Moscow City Court, the Court considers that they essentially concern the proportionality of the disputed measure and will be more appropriately considered under this head. The same applies to the arguments adduced in contesting the legitimate aim relied on by the Government. The Court will therefore assume that the measure at stake complied with the first two conditions and will proceed to examine whether it was "necessary in a democratic society".

2. "Necessary in a democratic society"

82. In assessing whether the decision to bar the applicant from holding judicial office, taken in response to her public statements, was "necessary in a democratic society", the Court will consider the circumstances of the case as a whole and examine these in the light of the principles established in the case-law, which have been summed up as follows (see, among other authorities, *Jersild v. Denmark*, of 23 September 1994, § 31, Series A no. 298; *Hertel v. Switzerland*, 25 August 1998, § 46, *Reports of Judgments and Decisions*, 1998-VI; and *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II):

> "(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 ..."

83. In addition, the Court reiterates that the fairness of the proceedings, the procedural guarantees afforded (see, *mutatis mutandis*, *Steel and Morris*, cited above, § 95) and the nature and severity of the penalties imposed (see *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV; *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001-I; *Skałka v. Poland*, no. 43425/98, §§ 41-42, 27 May 2003; and *Lešník v. Slovakia*, no. 35640/97, §§ 63-64, ECHR 2003-IV) are factors to be taken into account when assessing the

proportionality of an interference with the freedom of expression guaranteed by Article 10.

84. In assessing whether there was a "pressing social need" capable of justifying interference with the exercise of freedom of expression, a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 42, *Reports* 1997-I, and *Harlanova v. Latvia* (dec.), no. 57313/00, 3 April 2003). However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists sufficient factual basis for that statement, since even a value judgment without any factual basis to support it may be excessive (see *De Haes and Gijsels*, cited above, § 47, and *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II).

85. The Court further reiterates that Article 10 applies also to the workplace, and that civil servants, such as the applicant, enjoy the right to freedom of expression (see *Vogt*, cited above, § 53; *Wille v. Liechtenstein* [GC], no. 28396/95, § 41, ECHR 1999-VII; *Ahmed and Others v. the United Kingdom*, 2 September 1998, § 56, *Reports* 1998-VI; *Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000; and *Guja v. Moldova* [GC], no. 14277/04, § 52, 12 February 2008). At the same time, the Court is mindful that employees owe to their employer a duty of loyalty, reserve and discretion. This is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion (see *Vogt*, cited above, § 53; *Ahmed and Others*, cited above, § 55; and *De Diego Nafría v. Spain*, no. 46833/99, § 37, 14 March 2002). Disclosure by civil servants of information obtained in the course of work, even on matters of public interest, should therefore be examined in the light of their duty of loyalty and discretion (see *Guja*, cited above, §§ 72-78).

86. The Court reiterates that issues concerning the functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection of Article 10. However, the Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect that confidence against destructive attacks which are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 34, Series A no. 313). The phrase "authority of the judiciary" includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence

on a criminal charge (see *Worm v. Austria*, 29 August 1997, § 40, *Reports* 1997-V). What is at stake as regards protection of the judiciary's authority is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large (see, *mutatis mutandis*, among many other authorities, *Fey v. Austria*, 24 February 1993, Series A no. 255-A). For this reason the Court has found it incumbent on public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question (see *Wille*, cited above, § 64).

87. In the context of election debates, on the other hand, the Court has attributed particular significance to the unhindered exercise of freedom of speech by candidates. It has held that the right to stand as a candidate in an election, which is guaranteed by Article 3 of Protocol No. 1, is inherent in the concept of a truly democratic regime (see *Melnychenko v. Ukraine*, no. 17707/02, § 59, ECHR 2004-X). It enshrines a fundamental principle for effective political democracy, is accordingly of prime importance in the Convention system and is crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see *Malisiewicz-Gąsior v. Poland*, no. 43797/98, § 67, 6 April 2006; *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 47, Series A no. 113; and *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 58, ECHR 2005-IX).

88. Turning to the present case, the Court notes that the Judiciary Qualification Board of Moscow charged the applicant with a disciplinary offence on account of a number of statements made in the course of her three media interviews. In their decision of 19 May 2004 (see paragraph 34 above) they cited the following statements:

> "– years of working in the Moscow City Court have led me to doubt the existence of independent courts in Moscow;
>
> – a judge, although defined by law as an embodiment of judicial power and independent in this capacity, in fact often finds himself in a position of an ordinary clerk, a subordinate of a court president;
>
> – the courts of law are used as an instrument of commercial, political or personal manipulation;
>
> – if all judges keep quiet this country may soon end up in a [state of] judicial lawlessness;
>
> – looking around, one is just stunned by the lawlessness. The law applies quite strictly to ordinary people, but this is not the case when it comes to persons holding important posts. But they break the law too – although they are not subject to liability;

– the court administration tests each judge to see how flexible he or she is, so that when it comes to [the allocation of cases] they know who can be entrusted with a delicate case and whom to avoid;

– in Siberia, by the way, the courts are much purer than in Moscow. There you cannot imagine such brutal manipulation and would not be talking about corruption to such an extent;

– I doubt that any provincial courts would harbour scandals as outrageous as those in the Moscow City Court, but this is a question of degree, while the problems are more general;

– a judge, although defined by law as an embodiment of judicial power and independent in this capacity, in fact often finds himself in a position of an ordinary clerk, a subordinate of a court president. The mechanism of how a decision is imposed on a judge is not to contact [the judge] directly; instead a prosecutor or an interested person calls the court president, who then tries to talk the judge into a 'right' decision, first gently, by offering advice or a professional opinion, then pushing him or her more strongly to take the 'correct' decision, that is, one that is convenient to somebody;

– in reality a court still more often than not takes the position of the prosecution. The courts then become an instrument of commercial, political or personal manipulation. No one can rest assured that his case – whether civil or criminal or administrative – will be resolved in accordance with the law, and not just to please someone."

89. The Judiciary Qualification Board of Moscow further noted that by making these statements the applicant "disseminated in civil society false and untruthful fabrications" and that the statements were "clearly based on fantasies, on knowingly false and distorted facts".

90. Apart from the above statements, the Judiciary Qualification Board of Moscow reproached the applicant for having "disclosed specific factual information concerning the criminal proceedings against Zaytsev before the judgment in this case had entered into legal force".

91. As regards the applicant's comments on the pending criminal proceedings, the domestic instances did not rely on any specific statements in this respect. The Court, for its part, sees nothing in the three impugned interviews that would justify the claims of "disclosure". Indeed, in support of her criticism of the role of court presidents, the applicant described her experience as a judge in the criminal proceedings against Zaytsev, alleging that the court was under pressure from various officials, in particular the Moscow City Court President. This, however, differed from the divulgation of classified information of which one may become aware in the course of his or her work (cf. *Guja*, cited above). The applicant's accounts of her experience in the above proceedings should therefore be regarded as statements of fact which, in the given context, were inseparable from her opinions expressed in the same interviews, extracts of which are listed above. The Court will therefore have to assess the factual foundation of the

applicant's statements before deciding on the appropriateness of the value judgments expressed in the interviews.

92. The Court observes that the applicant's account of the episode in which she was called and questioned by Ms Yegorova during the proceedings is disputed by the Government. They relied on the enquiry by the High Judiciary Qualification Panel, conducted following the applicant's complaint against Ms Yegorova. The Panel found itself short of evidence to prove that Ms Yegorova had attempted to influence the applicant, or to ascertain the absence of such attempts (see the internal report by judge S., paragraph 29 above). While the Court might accept the difficulties of establishing the content of communications between the applicant and Ms Yegorova in private, it notes that the applicant's account has support in the statements of the lay assessors and the court secretary. Furthermore, the Court cannot but note the Panel's overlooking of irregularities in the ensuing transfer of the case to another judge. The Court notes that pursuant to Article 242 of the Code of Criminal Procedure, the case must be examined by the same court composition except when one of the judges is no longer able to take part in the hearing. However, it follows from the report by judge S. that Ms Yegorova decided to withdraw the case from the applicant because of her disapproval of the applicant's conduct of the hearing and "the existence of confidential reports by relevant agencies" on the applicant's examination of Zaytsev's case. In the Court's view, the mere suggestion that such considerations may have triggered the transfer of a case under judicial examination from one judge to another should have warranted support for the applicant's allegations. Having overlooked this point, the qualification panel failed to secure a reliable factual foundation for their assessment, and this omission has not been made up for by any of the ensuing instances. Accordingly, the applicant's allegations of pressure have not been convincingly dispelled in the domestic proceedings.

93. Having concluded on the existence of a factual background for the applicant's criticism, the Court reiterates that the duty of loyalty and discretion owed by civil servants, and particularly the judiciary, requires that the dissemination of even accurate information is carried out with moderation and propriety (see *Guja*, cited above, and *Wille*, cited above, §§ 64 and 67). It will therefore continue to examine whether the opinions expressed by the applicant on the basis of this information were nevertheless excessive in view of her judicial status.

94. The Court observes that the applicant made the public criticism with regard to a highly sensitive matter, notably the conduct of various officials dealing with a large-scale corruption case in which she was sitting as a judge. Indeed, her interviews referred to a disconcerting state of affairs, and alleged that instances of pressure on judges were commonplace and that this problem had to be treated seriously if the judicial system was to maintain its independence and enjoy public confidence. There is no doubt that, in so

doing, she raised a very important matter of public interest, which should be open to free debate in a democratic society. Her decision to make this information public was based on her personal experience and was taken only after she had been prevented from participating in the trial in her official capacity.

95. In so far as the applicant's motive for making the impugned statements may be relevant, the Court reiterates that an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection (see *Guja*, cited above, § 77). Political speech, on the contrary, enjoys special protection under Article 10 (see the case-law cited in paragraph 87 above). The Court has previously established that even if an issue under debate has political implications, this is not by itself sufficient to prevent a judge from making any statement on the matter (see, *Wille*, cited above, § 67). The Court notes, and it is not in dispute between the parties in the present case, that the interviews were published in the context of the applicant's election campaign. However, even if the applicant allowed herself a certain degree of exaggeration and generalisation, characteristic of the pre-election agitation, her statements were not entirely devoid of any factual grounds (see paragraph 92 above), and therefore were not to be regarded as a gratuitous personal attack but as a fair comment on a matter of great public importance.

96. As for the manner in which the disciplinary penalty was imposed, the applicant argued that the courts implicated in her critical statements should not have heard her case. The Court observes that the question of termination of judicial office lay within the competence of the relevant judiciary qualification board, whose decision was subject to judicial review by the Moscow City Court and the Supreme Court. It further notes that before the start of the first instance proceedings the applicant requested both the Moscow City Court and the Supreme Court to have the case transferred from the Moscow City Court to another court of first instance on the grounds that the former had been implicated in the interviews that caused controversy and that the members of that court would lack objective impartiality for the purposes of her disciplinary proceedings. However, the Moscow City Court considered that it lacked legal capacity to order the transfer, whereas the Supreme Court disregarded the applicant's request and found later, acting as the appeal instance, that the applicant had failed to raise the issue when it was appropriate.

97. The Court considers that the applicant's fears as regards the impartiality of the Moscow City Court were justified on account of her allegations against that Court's President. However, these arguments were not given consideration, and this failure constituted a grave procedural omission. Consequently, the Court finds that the manner in which the

disciplinary sanction was imposed on the applicant fell short of securing important procedural guarantees.

98. Finally, the Court will assess the penalty imposed on the applicant. It notes that the disciplinary proceedings entailed the loss of the judicial office she held in the Moscow City Court and of any possibility of exercising the profession of judge. This was undoubtedly a severe penalty and it must have been extremely distressing for the applicant to have lost access to the profession she had exercised for 18 years. This was the strictest available penalty that could be imposed in the disciplinary proceedings and, in the light of the Court's findings above, did not correspond to the gravity of the offence. Moreover, it could undoubtedly discourage other judges in the future from making statements critical of public institutions or policies, for fear of the loss of judicial office.

99. The Court recalls the "chilling effect" that the fear of sanction has on the exercise of freedom of expression (see, *mutatis mutandis*, *Wille*, cited above, § 50; *Nikula v. Finland*, no. 31611/96, § 54, ECHR 2002-II; *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 114, ECHR 2004-XI; and *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 714, 13 November 2003). This effect, which works to the detriment of society as a whole, is likewise a factor which concerns the proportionality of, and thus the justification for, the sanctions imposed on the applicant, who, as the Court has held above, was undeniably entitled to bring to the public's attention the matter at issue.

100. Accordingly, it is the Court's assessment that the penalty at issue was disproportionately severe on the applicant and was, moreover, capable of having a "chilling effect" on judges wishing to participate in the public debate on the effectiveness of the judicial institutions.

101. In the light of the foregoing, the Court considers that the domestic authorities failed to strike the right balance between the need to protect the authority of the judiciary and the protection of the reputation or rights of others, on the one hand, and the need to protect the applicant's right to freedom of expression on the other.

102. There has accordingly been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

103. 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

104. The applicant claimed 25,000 euros (EUR) in respect of non-pecuniary damage.

105. The Government considered this amount unsubstantiated and excessive. They claimed that an acknowledgement of a violation, if found by the Court, would by itself constitute sufficient just satisfaction.

106. The Court considers that the applicant must have suffered distress on account of the facts of the case. Ruling on an equitable basis, it awards the applicant EUR 10,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

107. The applicant requested the Court to make an award for costs and expenses on account of the *pro bono* work conducted by her lawyers in the present case, in the amount to be determined by the Court.

108. The Government objected to the claim.

109. Under the Court's case-law, an applicant is entitled to reimbursement of his or her costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the lack of any quantified submissions, the Court rejects the claim for costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 10 of the Convention;

2. *Holds* by four votes to three
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles

at the rate applicable at the date of settlement, plus any tax that may be chargeable;

(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;

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

Done in English, and notified in writing on 26 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Christos Rozakis
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:

(a) dissenting opinion of Judge Kovler, joined by Judge Steiner;

(b) dissenting opinion of Judge Nicolaou.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE KOVLER JOINED BY JUDGE STEINER

(Translation)

I regret that I am unable to join the fragile majority in this judgment.

The case concerns not only the applicant's personal situation, but also crucial points of judicial ethics as such. Unlike some followers of the "pure theory of law", I am not convinced that legal issues can be separated from ethical and moral problems and that the Convention and national law can be analysed only nominally.

The Resolution on Judicial Ethics adopted by the Plenary of our Court on 23 June 2008 stipulates in point VI, on "Freedom of expression": "*Judges shall exercise their freedom of expression in a manner compatible with the dignity of their office. They shall refrain from public statements or remarks that may undermine the authority of the Court or give rise to reasonable doubt as to their impartiality*". Having applied this principle to ourselves, we must then apply it to our colleagues in other courts, who are also constrained by similar obligations, namely laws on the status of judges and Codes of judicial ethics adopted by judicial communities (see paragraphs 43-44 of the judgment). Thus, laws and professional ethics are a common ground in assessing judges' behaviour.

In its decision on inadmissibility in the case *Pitkevich v. Russia* (no. 47936/99, 8 February 2001) – concerning the dismissal of a judge who misused her office to pursue religious activities – the Court, having analysed judge Pitkevich's dismissal, found that the judiciary, while not part of the ordinary civil service, was nonetheless part of typical public service. A judge has specific responsibilities in the field of administration of justice, a sphere in which States exercise sovereign powers. Consequently, a judge participates directly in the exercise of powers conferred by public law and performs duties designed to safeguard the general interests of the State. In the Pitketich case the Court concluded, in line with its *Pellegrin* judgment (*Pellegrin v. France* [GC], no. 28541/95, ECHR 1999-VIII), that the dispute concerning the judge's dismissal did not concern her "civil" rights or obligations within the meaning of Article 6 of the Convention, and that her dismissal pursued legitimate aims within the meaning of paragraph 2 of Article 10 of the Convention, with a view to protecting the rights of others and maintaining the authority and impartiality of the judiciary.

Even assuming that the present case differs substantially from that mentioned above, a similar problem arises concerning the limits on the freedom of expression of judges.

It is known from the Court's case-law that the status of a public or civil servant does not deprive the individual concerned of the protection of Article 10. In its recent judgment in the case of *Guja v. Moldova*, the Grand

Chamber again reiterated that "the protection of Article 10 extends to the workplace in general and to public servants in particular" (see *Guja v. Moldova* [GC], no. 14277/04, § 52, ECHR 2008-...; see also *Vogt v. Germany*, 26 September 1995, § 53, Series A no. 323; *Wille v. Liechtenstein* [GC], no. 28396/95, § 41, ECHR 1999-VII; *Ahmed and Others v. the United Kingdom*, 2 September 1998, § 56, *Reports of Judgments and Decisions* 1998-VI; *Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000). However, the right to freedom of expression as such is not without limits and the Court in the same *Guja* judgment warns against an entirely "permissive" reading of Article 10: "At the same time, the Court is mindful that employees owe to their employer a duty of loyalty, reserve and discretion. This is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion" (see *Guja*, cited above, § 70; *Vogt*, cited above, § 53; *Ahmed and Others*, cited above, § 55; *De Diego Natria v. Spain*, no. 46833/99, § 37, 14 March 2002). The Court in the present judgment reproduces this reasoning (see paragraph 85), but ignores its development in *Guja*, and thus I am obliged to reiterate the following conclusion from paragraph 71 of the *Guja* judgment (since, on occasion, an omission may be significant):

> "Since the mission of civil servants in a democratic society is to assist the government in discharging its functions and since the public has a right to expect that they will help and not hinder the democratically elected government, the duty of loyalty and reserve assumes special significance for them (see, *mutatis mutandis*, *Ahmed and Others v. the United Kingdom*, cited above, § 53). In addition, in view of the very nature of their position, civil servants often have access to information which the government, for various legitimate reasons, may have an interest in keeping confidential or secret. Therefore, the duty of discretion owed by civil servants will also generally be a strong one."

Turning to the present case, I would point out that the Judiciary Qualification Board of Moscow reproached the applicant for having "disclosed specific factual information concerning the criminal proceedings against Zaytsev before the judgment in this case had entered into legal force" (paragraph 34). Let us remember that the criminal proceedings concerned Mr Zaytsev's actions as an investigator in an extremely sensitive case of large-scale corruption, and that this case is still pending. It is very strange that in this regard the Court concludes: "The Court, for its part, sees nothing in the three impugned interviews that would justify the claims of 'disclosure'" (paragraph 91). Even accepting that statements giving details of a pending case in which the applicant was a judge do not amount to the divulgation of classified information, it is somewhat difficult to consider them as a value judgment. The Court appears to justify this behaviour:

> "There is no doubt [sic! – AK] that, in so doing, she raised a very important matter of public interest which should be open to free debate

in a democratic society. Her decision to make this information public was based on her personal experience and was taken only after she had been prevented from participating in the trial in her official capacity" (paragraph 94).

It is necessary to point out that "after [she] had been prevented from participating in [one] trial", the applicant subsequently sat as a judge in several other criminal cases (paragraph 16) and her office as judge was not at this stage terminated, but only temporarily suspended for two months, pending the elections and at her own request. Nothing indicates that she was released from her obligation to uphold judicial ethics and her obligation of professional discretion. Yet the applicant abused her immunity as a candidate, disclosing specific factual information concerning the criminal proceedings in a sensitive case before the judgment in that case had entered into legal force.

For the Court this, shall we say "uncommon" (for an acting judge), behaviour is justified by the fact that, at the time of her statements, the applicant was involved in an electoral campaign: "political speech ... enjoys special protection under Article 10" (paragraph 95). Thus, if one wishes to settle a personal score with someone, it is safer to do so during an electoral campaign, as in that case even a disclosure of professional and restricted information is "not to be regarded as a gratuitous personal public attack, but as a fair comment on a matter of great public importance" (paragraph 95).

This conclusion, which is more than "permissive", contrasts with another: "... the Court has found it incumbent on public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question ..." (paragraph 86). Disclosure by civil and public servants of information obtained in the course of their work, even on matters of public interest, must be examined in the light of their duty of loyalty and discretion. Once again, I would point out that in the case of *Guja* (cited above, §§ 72-78) the Court held that, in deciding whether the signalling of illegal conduct or wrongdoing in the workplace enjoyed the protection of Article 10, account must be had to whether there was available to the civil servant in question any other effective means of remedying the wrongdoing which he or she intended to uncover, such as disclosure to the person's superior or other competent authority or body ... The applicant preferred to do so publicly some months later, during her electoral campaign (see paragraph 19) and only after this did she lodge the complaint with the High Judiciary Qualification Panel (see paragraph 24): this was clearly done in order to achieve her personal goals, as the Government has submitted.

It is significant that all of the applicant's allegations concerning procedural irregularities during her participation in the criminal case against Mr Zaytsev were examined by an independent judge from the commercial courts system, and were rejected as unsubstantiated because the applicant

failed to prove the alleged facts. The remainder of the applicant's statements in the course of her media interviews, such as "the courts of law are used as an instrument of commercial, political and personal manipulation" could be easily tolerated if made by journalists or professional politicians, but are not reconcilable with the status of a judge within the same judicial system, in which she had exercised her profession for 18 years. The central moral issue in this story is that, through her conduct, former judge Kudeshkina excluded herself from the community of judges *prior* to the imposition of the disciplinary penalty. Thus, there was a reasonable relationship of proportionality between the measures applied against the applicant and the legitimate aim of protection of the authority of the judiciary as provided by paragraph 2 of Article 10 of the Convention (see *Vogt*, cited above, § 53). These measures were "prescribed by law" (see paragraphs 45-47 of the judgment), pursued a legitimate aim as provided by the last sentence of Article 10 § 2 ("preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary") and were "necessary in a democratic society", leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference was proportionate to the above aim (see, among other authorities, *Vogt*, cited above, § 53).

The Court draws attention to the "chilling effect that the fear of sanction has on the exercise of freedom of expression". I am afraid that the "chilling effect" of this judgment could be to create an impression that the need to protect the authority of the judiciary is much less important than the need to protect civil servants' right to freedom of expression, even if the civil servant's *bona fide* intentions are not proved. I am profoundly pained by the Court's conclusions. I hope that my esteemed colleagues will pardon me this freedom of expression.

DISSENTING OPINION OF JUDGE NICOLAOU

The circumstances in which the Zaytzev case was transferred to another judge, during a trial conducted by the applicant, does indeed give cause for concern. This concern does not emanate directly from the applicant's statements to the mass media as to what had taken place, since her version was disputed and it could not, therefore, be accorded preference in the present context. It is rather a concern arising from what was stated in a report prepared by an investigating judge, following the applicant's complaint concerning those circumstances.

It should be noted that after 23 July 2003, when the case was assigned to another judge, the applicant acted as judge in several other criminal cases until the end of October 2003 when, at her request, she was excused from her judicial duties as she was a candidate in the general elections of 7 December 2003 for the State Duma of the Russian Federation. It was not until the beginning of December 2003, in the context of the election campaign and more than four months after the transfer of the Zaytzev case, that the applicant gave the interviews containing the impugned statements by which she attacked the domestic judicial system; and it was on the day of the last two interviews, 4 December 2003, that she lodged with the High Judiciary Qualification Panel a complaint that the Moscow City Court President had unlawfully exerted pressure on her to deflect her from the proper exercise of her judicial duties. There was thus a substantial delay but I am prepared to accept that nothing much turns on this.

Next, it should be noted that under Article 6.2 of the Code of Criminal Procedure of the Russian Federation, court presidents have administrative duties in addition to their judicial functions. They are thus responsible for organising the Court's work and for distributing cases to judges. This is subject to Article 242 of the same Code, which states expressly what in principle should be taken for granted, namely that a case must be examined by one and the same judge unless he or she is no longer able to take part in the hearing. It was, apparently, in exercise of the powers conferred by Article 6.2 that in the instant case the Moscow City Court President withdrew the case from the applicant. Initially, this was on the pretext that if the case had remained with the applicant an unacceptable delay would have ensued. But this was later changed. In the report prepared by the investigating judge it was stated that the grounds relied on by the court president were, in fact, that the applicant: "was unable to conduct the court hearing, her procedural acts were inconsistent, [she acted] in breach of the principle of adversarial proceedings and equality of arms, she stated her legal opinion on the pending criminal case and she attempted to seek the court president's advice on the case, and in view of the existence of confidential reports by relevant agencies to the Moscow City Court

President with regard to judge Kudeshkina, in connection with the examination of Zaytsev's case and other criminal cases".

It has not been shown that, on an interpretation of the said Article 6.2, the domestic courts recognised that court presidents had such sweeping powers of dealing administratively with what are, quite clearly, procedural matters of a judicial nature; and it would be rather astonishing if they had. What, however, is most disquieting was the reliance placed on "... confidential reports by relevant agencies to the Moscow City Court President with regard to judge Kudeshkina ..." as a ground for removing the judge from the case. The investigating judge does not seem to have thought that such grounds raised any issue and neither did he relate them to the applicant's version of events which was, to some extent, supported by the written statements of the lay assessors and the court secretary, at least in the way that events had unfolded. His conclusion that there was insufficient evidence in support of the applicant's allegations, merely because they were denied by the person against whom they were made, cannot be regarded as satisfactory. Finally, it does not appear that the appropriate authorities addressed any of these matters in their decision not to proceed further with the complaint.

Against this background, and in the light of the investigating judge's report which left room for a number of scenarios, the applicant's right to freedom of expression acquired particular significance. That much I would accept. And although it seems to me that a judge, more than anyone else, should not go public either while a matter is sub judice – as it was in the present case – or before submitting a complaint to the appropriate authority and giving time for a response - which the applicant had failed to do – I might still contemplate the possibility of yielding to the view, apparently favoured by the majority, that a judge retained the right to go public immediately, on the basis presumably of highly exceptional circumstances.

The most important aspect of this case is, however, that the applicant's statements were not confined to the Zaytzev trial. The applicant referred directly and in no uncertain terms to a much wider problem in the domestic judicial system. Relying on her many years of experience at the Moscow City Court, she stated categorically that she doubted the existence of independent courts in Moscow. She asserted, without any qualifying words and without specifying other instances, that Moscow courts are, in both their civil and criminal jurisdictions, systematically used as an instrument of commercial, political or personal manipulation; she spoke of brutal manipulation of judges, of outrageous scandals and of extensive corruption in the Moscow courts; and she concluded that if all judges kept quiet the country might soon end up in "judicial lawlessness". As I read them, her statements clearly imply that she knew of particular instances which justified what she was describing as the magnitude of the problem. But she made no effort to substantiate this factual substratum before expressing

value judgments on the extent and the gravity of the situation, which she summarised by saying that "[n]o one can rest assured that his case – whether civil or criminal or administrative – will be resolved in accordance with the law, and not just to please someone." These are extremely strong words coming from a judge and should not have been made unless the judge was able to back them up, at least to a meaningful extent.

The majority judgment concentrates on the Zaytzev incident without, in my view, addressing sufficiently the applicant's statements about the wider problem, as she had alleged it, created by a mass of other similar instances of which the Zaytzev case was only an example. It was, in fact, her insistence that such conduct was widespread and systematic that formed the basis for her conclusions that it was impossible for an ordinary citizen to obtain justice in the Moscow courts. Further, in so far as the majority judgment makes reference to the applicant's statements generally, I am unable to agree that the statements consisted essentially of value judgments requiring no substantiation, though I recognise the flexibility of the Court's case-law on the matter.

If, indeed, the applicant knew of facts other than those concerning the Zaytzev case that judicial corruption was so rampant and judges were so effectively subjugated to behind the scenes arrangements, the applicant ought to have been more specific in her allegations. As it was, she condemned every single judge working in the Moscow courts as being either a willing accomplice or a helpless victim of a corrupt judicial system, and showed no regard for judges who, like herself, might also have claimed to have been above reproach. In short, she condemned indiscriminately all judges, demolishing in this way the whole judicial system. The incident in the Zaytsev case, taken alone, could not possibly have given cause for such far-reaching statements.

It should be borne in mind that what a judge says in public can have considerable impact since people would naturally consider a judge's views as balanced and verified; whereas, for example, it is generally understood that a journalist, who is regarded as a public watchdog, may sometimes be provocative or prone to exaggeration and so more latitude is allowed. At the time that the impugned statements were made, the applicant's judicial functions had already been suspended to enable her to conduct her political campaign. She could, consequently, express herself much more freely. But she still remained a judge. She was still bound by the Law on the Status of Judges and she should have had regard to the Code of Honour of a Judge, whether this latter had legislative effect or not. So her speech had to be tempered by discretion. Instead, she went to unacceptable extremes. In my opinion, therefore, it was reasonably open to the domestic authorities to find, as they did, that "the actions of judge Kudeshkina have degraded the honour and dignity of a judge, discredited the authority of the judiciary [and] caused substantial damage to the prestige of the judicial profession,

thus constituting a disciplinary offence". Further, in these circumstances the disciplinary sanction imposed on the applicant was not, in my opinion, disproportionate.

There is one last thing. The applicant complained of a procedural irregularity in the examination of her application for judicial review. The complaint does not, in my view, amount to anything. Although with some delay, it was pointed out to her by a judge of the Supreme Court that the rules on jurisdiction prevented the transfer of judicial review of her case from the Moscow City Court to another court. In any event the involvement of the Moscow City Court could not have had a determinative influence on the outcome of the proceedings as a whole, given that the substantive findings and the final review of the sanction lay with bodies whose impartiality was not called into question.