



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

FOURTH SECTION

CASE OF LEWANDOWSKA-MALEC v. POLAND

(Application no. 39660/07)

JUDGMENT

STRASBOURG

18 September 2012

FINAL

18/12/2012

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

In the case of Lewandowska-Malec v. Poland,

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

David Thór Björgvinsson, *President*,
Lech Garlicki,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 28 August 2012,

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

PROCEDURE

1. The case originated in an application (no. 39660/07) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Ms Izabela Lewandowska-Malec (“the applicant”), on 31 August 2007.

2. The applicant was represented by Ms D. Bychawska-Siniarska, a lawyer with the Helsinki Foundation of Human Rights, a non-governmental organisation based in Warsaw. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that her conviction and punishment for defamation had been in breach of her right to freedom of expression.

4. On 27 August 2009 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1962 and lives in Kraków.

6. The applicant is an assistant professor at the Law Faculty of the Jagiellonian University in Kraków. She is also teaching at a private

university. In 2009 the applicant successfully defended her habilitation thesis.

7. From 1990 to 1994 she was the mayor of the Świątniki Górne commune. Between 1998 and 2002 the applicant served as a local councillor for the Kraków District. In July 2003 she became a local councillor in Świątniki Górne.

8. J.B. has been the mayor of the commune (later of the municipality) since 1994. The applicant lost the elections for mayor in 1998 and 2002.

9. In 2000 Kraków-Podgórze District Prosecutor's Office opened an investigation into an alleged fraud by the officials of the municipality. In November 2000 the district prosecutor M.J. charged the mayor with fraud in respect of a request for a subsidy. At its extraordinary session held on 8 January 2001 the municipal council adopted a statement, apparently drafted by the mayor, which was to be transmitted to the superiors of the Kraków Regional Police Headquarters and the Kraków-Podgórze District Prosecutor's Office as well as to the Minister of Internal Affairs and Administration, the Minister of Justice and the media. The statement read, *inter alia*, as follows:

“1. The Świątniki Górne Municipal Council strongly objects to using the Kraków-Podgórze District Prosecutor's Office for the personal and political goals of the prosecutor M.J.

2. The Świątniki Górne Municipal Council strongly objects to the political agitation against the democratically elected authorities of the local government ... carried out by K.P., the officer of the Kraków Regional Police Headquarters.

Both the above-mentioned state officials in the course of their work, in the pending proceedings, violated the principle of impartiality and political neutrality binding on state services, transgressing their professional competences.

Thus they infringed the very principle of the rule of law in a manifest breach of Article 2 of the Constitution ...

In those circumstances the municipal council strongly objects to the extralegal activities (*pozaprawnej działalności*) of the above-mentioned state officials and demands from their superiors that these destructive activities be immediately put to a halt and that disciplinary measures be taken against them.”

The statement of the municipal council was reported in the local media.

10. The mayor complained to the Kraków Appellate Prosecutor's Office about the alleged irregularities in the investigation and requested that the prosecutor M.J. be removed from it. The investigation was put under the supervision of the Appellate Prosecutor's Office. Subsequently, the prosecutor M.J. was promoted to the position of Deputy Head of the Kraków-Śródmieście District Prosecutor. J.P., a new prosecutor assigned to the case, discontinued the investigation in October 2001.

11. According to the applicant, from 2003 she was anonymously informed about financial and other irregularities in the mayor's work. She and another local councillor requested the prosecution service to investigate those irregularities, but all investigations were eventually discontinued. In the applicant's view the investigations were not thorough and the decisions to discontinue them had been based on favourable expert opinions or evidence given by the commune's civil servants.

12. On 25 June 2004 the mayor J.B. placed in the *Rzeczpospolita* daily newspaper an appeal addressed to the President of the Republic as the guardian of the Constitution. The mayor argued that the status of the Adjudicating Commissions (*Komisje Orzekające w sprawach o naruszenie dyscypliny finansów publicznych*) of the Regional Audit Chambers (*Regionalne Izby Obrachunkowe*) was incompatible with the constitutional provisions on the administration of justice and that the procedures before them violated citizens' rights. He called on the President to introduce a bill in the parliament with a view to rectifying those supposed shortcomings.

13. On 9 July 2004 the Polish Press Agency published on its website, in the local government section, the article "The mayor's settling scores with the Regional Audit Chamber". The article stated that in 2003 the Kraków Regional Audit Chamber had reviewed the finances of the mayor's commune and had established a significant number of irregularities. It went on to say that the mayor had not mentioned his personal motives behind his appeal to the President. The Polish Press Agency invited readers to send in comments about the regional audit chambers.

14. On 16 July 2004 the Polish Press Agency posted on its website a letter sent by the applicant. It read as follows:

"As a local councillor for Świątniki Górne I observe with indignation the actions undertaken by the mayor J.B. They serve not to promote, but to embarrass our municipality.

The methods of the mayor have been the same for years. In 2001, when he was charged with fraud ..., which amounted to misappropriation of a subsidy from the Agency for Restructuring and Modernisation of Agriculture, he was the author of a resolution [adopted] by the municipal council, which ruthlessly attacked the prosecutor conducting the proceedings and the police officer.

In the text of the resolution we found, among others, the following expressions: "both the above-mentioned state officials in the course of their work, in the pending proceedings, violated the principle of impartiality and political neutrality binding on state services, transgressing their professional competences. Thus they infringed the very principle of the rule of law. The actions of both officials directed against the local government of Świątniki Górne destabilise the functioning of Polish democracy and undermine the citizens' confidence in state authorities." There are more expressions of this kind in the resolution.

The reading of that text fills me, at least, with fear. Thus, the question should be asked how could such a resolution have been adopted?

The answer is simple. The mayor has a majority in the council. The councillors support him unconditionally and without any reflection.

So what happened in the end with that case? The prosecutor conducting the proceedings was soon replaced, and the case was discontinued on account of the insignificant degree of social danger (sic!), although in the reasons for the discontinuation decision the act was considered to have been clearly committed.

The fact that the State authorities went on the defensive, instead of taking appropriate measures against the person who had clearly broken the law and defamed state officials, may come as a great surprise. Thus, it is not surprising that after his first 'success' the mayor attacked another state authority which had established irregularities in his activities.

The irregularities established by the report of the Regional Audit Chamber are currently being examined by the prosecution service. The investigation concerning the purchase of the official car is pending. There is also a pending case concerning fraud in respect of the documents of the official car, because when the mayor was on business trips in Poland or abroad, he certified with his own signature that he had travelled a few times a day between Kraków and Świątniki Górne. It is likely that those are fake trips, and he needed to account for them in order to claim allowances for the use of his private car. It was common knowledge that he did not use it.

These proceedings conducted by the prosecution service have been artificially prolonged, which prompts me to say that the mayor is putting extralegal pressure on that authority (*postępowanie to w prokuraturze jest sztucznie przedłużane, co skłania mnie do poglądu, że burmistrz czyni na ten organ pozaprawne naciski*).

...

I have the impression that the State authorities are simply afraid of the mayor. This means that our State cannot counteract such sort of actions. ..."

15. In August 2004 the mayor lodged with the Wieliczka District Court a private bill of indictment against the applicant, charging her with defamation committed through the mass media under Articles 212 § 2 of the Criminal Code. The mayor relied on the passage from the applicant's letter which stated that "these proceedings conducted by the prosecution service have been artificially prolonged, which prompts me to say that the mayor has put extralegal pressure on that authority".

16. The District Court heard numerous witnesses, including prosecutors and police officers who had conducted various investigations against the mayor. They all denied that anyone had put pressure on them in respect of the investigations concerned.

17. The court noted that it was not its role in the present proceedings to examine whether the investigations involving the mayor had been properly conducted. Neither, was it to examine whether the allegations made in the statement of the municipal council had been justified. The trial court took note of the fact that the mayor had prepared most of the resolutions of the

municipal council and that he had identified himself with the statement of the municipal council of 8 January 2001.

18. The applicant stated, *inter alia*, that the change of the prosecutor, who had been conducting the fraud investigation, was proof that the mayor had put extralegal pressure on the prosecution authorities. That investigation had been discontinued on the ground of the insignificant social danger of the alleged offence despite the earlier statements of the spokesperson for the Prosecutor's Office to the effect that a bill of indictment was being prepared.

19. On 12 September 2006 the Wieliczka District Court found the applicant guilty of defamation committed through the mass media. It held that in her letter she had imputed to the mayor J.B. behaviour which could denigrate him in the eyes of the public and undermine the public confidence necessary for the discharge of his duties. The court imposed a fine of 7,500 Polish zlotys (PLN; approx. EUR 1,900) on the applicant. It ordered her to publish the judgment on the Internet site of the Polish Press Agency for a period of two weeks and once in a local edition of *Dziennik Polski*, a newspaper published in Kraków. Furthermore, the trial court ordered her to reimburse the private prosecutor's costs (PLN 1812, approx. EUR 450) and the costs of the State Treasury (PLN 763.60, approx. EUR 190).

20. The District Court found that:

"In the present case there is no doubt that Izabela Lewandowska-Malec acted intentionally with a view to defaming the mayor J.B. She was certainly aware that the statement that he puts extralegal pressure on the prosecution service would amount to defamation in the eyes of the public. The long conflict between Izabela Lewandowska-Malec and the private prosecutor [the mayor] which manifested itself, among others, in the previous critical statements of the accused or in her press articles about the mayor of Świątniki Górne also indicates that she acted deliberately.

Article 212 §§ 1 and 2 of the Criminal Code protects reputation or the good name of a person who was defamed. ...

The statement that somebody puts extralegal pressure on the prosecution service clearly suggests that such person acts illegally and resorts, for example, to bribery or threats, etc. The word "extralegal" was important in the accused's statement as it carried negative associations referred to above. It should be underlined that *sui generis* attempts to put pressure or influence the prosecution service and the proceedings conducted by it can be lawfully undertaken by means provided for by law, such as complaints to hierarchical prosecutors or appeals against decisions given in the proceedings. Such actions, whether they would be justified on the merits or not, are legal. On the other hand, the term "extralegal" refers to undertaking actions contrary to the law, which could be perceived by the public opinion only negatively. Thus, there could be no doubt that the statement included in the accused's letter was to be considered defamation. ...

The evidence obtained in the case does not leave any doubts that the act of Izabela Lewandowska-Malec amounted to defamation of the mayor of Świątniki

Górne, J.B., committed through the mass media, thus making out the elements of the offences specified in Article 212 § 2 of the Criminal Code ...”

21. The District Court next examined whether the applicant could be exonerated on the basis of Article 213 § 2 of the Criminal Code. That provision specified that there was no defamation if the allegation was true and if bringing it to the attention of the public was in the public interest. The trial court found that the applicant could not successfully rely on that defence since she had failed to prove the truthfulness of her allegation that the mayor had put extralegal pressure on the prosecution authorities. Witnesses heard in the case did not confirm such an allegation. Having regard to this conclusion, the trial court held that there was no need to determine whether the applicant’s allegations had pursued public interest.

22. The trial court further examined whether the applicant could have acted in the erroneous belief that her allegations against the mayor had been true. Having regard to the evidence adduced in the case, it found that there were no justified grounds for the applicant’s belief as to the truthfulness of her allegations. In this connection, the trial court observed that the applicant had long been in conflict with the mayor and on numerous occasions had requested the prosecution service to investigate the cases in which the mayor had allegedly breached the law. In some of the investigations she had succeeded in having the case remitted or reopened; however none of them had concluded with the filing of a bill of indictment. Assessing the situation objectively, the court noted that the actions of the mayor and the manner in which the investigation had been conducted could at most give rise to some doubts, but certainly did not justify the statement that the mayor had been putting extralegal pressure on the prosecution service. Furthermore, it underlined that had the applicant had suspicions regarding the mayor she should have notified the prosecution service about them with a view to having them objectively verified.

23. The trial court examined the applicant’s argument that her statement was protected by Article 10 of the Convention. It held that it was too far-reaching to be covered by this provision, which also protected the reputation and the rights of others. Certainly, the mayor as a person holding public office had to accept that his activity would be scrutinised and that every citizen could express his or her views with respect to the actions of the authorities. Thus, opinions in respect of a politician could concern his efficiency in governing, his ability to take decisions, his aptitude or inaptitude to hold public office. Opinions consisted in expressing one’s view on a subject open to abstract value judgment, which was not entirely measurable. However, the impugned statement of the applicant concerned the facts which were not supported by the reality of things but were based on her speculations and guesses. She could have expressed opinions regarding her doubts as to the correctness of the prosecutor’s decisions or the manner in which the investigations had been conducted, etc.; however,

her statement did not fall into this category. The applicant did not formulate a value judgment but alleged that an offence had been committed and thus she asserted the existence of a fact. In so far as the applicant argued that the Press Act was applicable to her case, the trial court noted that, in any event, she had not displayed particular diligence when publishing her allegations. The trial court concluded that the applicant's actions did not come under the right to freedom of expression guaranteed by the Constitution and the Convention. The right to criticism and to express one's opinions did not include the right to formulate unjustified and unproved allegations that an offence had been committed. The allegation that the mayor had put extralegal pressure on the prosecution service was to be associated either with an attempt to bribe or an attempt to resort to threats or violence in order to influence a decision of a public authority.

24. As regards the sentence, the District Court found, having regard to the applicant's clean criminal record, that it would have been inappropriate to impose a prison sentence. It sentenced her to a fine of PLN 7,500 which it considered proportionate to her degree of guilt and the social danger of her act. It had regard to the fact that the applicant's monthly income was in the region of PLN 4,000, that her husband was an entrepreneur and that they had three children to support.

25. The applicant filed an appeal against the first-instance judgment on 19 October 2006. She argued that the court had disregarded her right to freedom of expression. In addition, she submitted that the court had erred in considering that it could not evaluate the various investigations conducted against the mayor, although the applicant's critical assessment of those investigations had formed the basis for her opinion expressed in the letter.

26. According to the applicant, after the first-instance judgment had been given, she was approached by R.M., the chairman of the municipal council and one of the closest collaborators of the mayor. The applicant together with two other councillors and her husband had met R.M. on a number of occasions. He informed them that the investigations concerning the mayor, in particular the one in respect of the alleged fraud, had been "arranged".

27. On 17 January 2007 the applicant filed a supplement to her appeal and requested the Regional Court to hear evidence from R.M.

28. On 20 April 2007 the Kraków Regional Court held a hearing. The applicant requested the court to hear R.M. and other persons who had met him. The court refused that request, finding that the evidence concerned events which had occurred after the first-instance judgment had been delivered and was therefore irrelevant for the case.

29. On the same day the Regional Court upheld the first-instance judgment, finding the applicant's appeal manifestly ill-founded. It ordered the applicant to reimburse PLN 420 (EUR 100) to the private prosecutor for his costs.

30. The Regional Court found that the applicant had failed to prove the truthfulness of her statement. It further held that a defamatory statement which deliberately employed untrue information was not protected under Article 10 of the Convention. As regards the sentence, the Regional Court observed that a fine was the most lenient penalty for an offence of defamation and that its amount had been proportionate to the applicant's degree of guilt and the social danger of her act.

31. The applicant unsuccessfully requested the Prosecutor General and the Ombudsman to file a cassation appeal in her case.

32. The applicant further requested the Kraków Court of Appeal to reopen the proceedings. She argued that after the first-instance judgment had been given R.M. had informed her that pressure had been exerted by the mayor on the prosecutors.

33. The Court of Appeal heard R.M. On 29 May 2008 it dismissed the applicant's request to reopen the proceedings, finding that R.M.'s evidence had not substantiated the applicant's allegations against the mayor.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant provisions of the Criminal Code

34. Article 212 provides in so far as relevant:

“§ 1. Anyone who imputes to another person, a group of persons, an institution, a legal person or an organisation without legal personality, such behaviour or characteristics as may lower this person, group or entity in public opinion or undermine public confidence in their capacity necessary for a given position, occupation or type of activity, shall be liable to a fine, a restriction of liberty or imprisonment not exceeding one year.

§ 2. If the perpetrator commits the act described in paragraph 1 through the mass media he shall be liable to a fine, a restriction of liberty or imprisonment not exceeding two years.”

35. Article 213 provides as follows:

“§ 1. The offence specified in Article 212 § 1 is not committed, if the allegation made in public is true.

§ 2. Whoever raises or publicises a true allegation in defence of a justifiable public interest shall be deemed not to have committed the offence specified in Article 212 §§ 1 or 2; if the allegation regards private or family life evidence of truthfulness shall be admitted only when it serves to prevent a danger to someone's life or to prevent the demoralisation of a minor.”

B. The Constitutional Court's judgment of 30 October 2006, case no. P 10/06

36. On 30 October 2006 the Constitutional Court, ruling on a legal question referred to it by the Gdańsk District Court, declared Article 212 §§ 1 and 2 of the Polish Criminal Code compatible with Articles 14 and 54 § 1 of the Constitution read in conjunction with Article 31 § 3.

The Constitutional Court found that in some circumstances the protection of rights and freedoms like dignity, good name and privacy might prevail over the protection of freedom of expression. The Court further found that there was no basis to assume that protection of personal rights through the civil law alone would be equally efficient as criminal law. Protection of personal rights by means of the criminal law did not by itself infringe the relevant provisions of the Constitution.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

37. The applicant complained that there had been a violation of her right to freedom of expression on account of her conviction and sentence for defamation. She relied on Article 10 of the Convention, which reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

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

A. Admissibility

38. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

39. The applicant argued that the impugned passage from her letter was a value judgment and not a statement of fact as claimed by the Government. She emphasised that the use of the term “prompts me to say” indicated that her statement was an expression of opinion. The applicant argued during the trial and in her appeal that the courts had to distinguish between facts and opinions. However, the domestic courts failed to consider that argument. In the applicant's view, she expressed critical opinions about the mayor which was not susceptible of proof while the domestic courts' practice required that their truth be demonstrated. Moreover, as those opinions were expressed in the context of a political debate they should be offered special protection since pluralism of opinions was crucial in a democratic society.

40. The applicant argued that her aim was to inform the public about the ideas and attitudes of the mayor and about certain irregularities in the exercise of his office. Her letter concerned matters of public concern and she acted in good faith as a representative of society and of the political opposition. The applicant, drawing similarities with the case of *Castells v. Spain*, argued that the interference with the freedom of expression of an opposition member called for the closest scrutiny. The applicant admitted that her letter contained harsh criticism of the mayor; however it was a response to the mayor's appeal in which he claimed that the Regional Audit Chambers were unconstitutional and that they were undertaking activities comparable to Stalin's regime. In the applicant's opinion, the language used by the mayor was provocative and harsh, while her response was very balanced and subtle. Only the last sentence of the letter contained strong language. The authorities did not properly balance the need to protect the reputation of the mayor and the general interest served by criticism aimed at those exercising power.

41. The applicant claimed that the numerous investigations against the mayor and the irregularities established by the Regional Audit Chamber constituted a sufficient basis to denounce his possible *extralegal* influence on the prosecutors. The significant number of investigations instituted against the mayor and then discontinued should alarm every citizen. The role of political opposition and the media was to act as public watchdogs. In her letter addressed to the Polish Press Agency the applicant presented examples of proceedings which had been instituted against the mayor and subsequently discontinued. In respect of some of those proceedings she considered that the prosecution authorities had proceeded in a protracted

and irregular manner. She could assess those facts in a professional manner as she was a lawyer and had completed a judicial traineeship. She was also an academic specialising in the field of administrative law.

42. The Government admitted that the applicant had succeeded in having some cases [against the mayor] remitted and reopened but that none of them had concluded with the filing of a bill of indictment. For the applicant this was the essence of the questions and opinions formulated in her letter to the Polish Press Agency. The trial court considered her letter as a statement of facts and examined evidence with a view to establishing the truth of her statements. However, the same court failed to assess whether the investigations against the mayor had been conducted professionally even if the number of such cases was alarming. Consequently, the applicant maintained that the domestic courts had not given relevant and sufficient reasons for their decisions. Further, the applicant's statements were a response to the appeal placed by the mayor in the *Rzeczpospolita* daily which contained some controversial ideas. Even if they were expressed in strong or exaggerated language they still deserved protection.

43. The applicant submitted that the Polish courts in criminal defamation cases never distinguished between facts and opinions, but required the accused to prove that his/her statements were true. The court did not analyse the purpose of the article and the good faith of the author. Article 212 § 2 of the Criminal Code was used by politicians in Poland as an instrument of censorship preventing the media from publishing information about their activities. The problem of politicians trying to influence prosecutors was widely discussed in the Polish press. Examples were regularly cited by the media and public debate concerning this issue was important. In 2007 the parliament established a commission of inquiry to examine allegations of political pressure put on the security services and prosecutors. Moreover, recently a new office of the General Prosecutor was created in order to reform the prosecution service and render it "apolitical".

44. The applicant submitted that the authorities had failed to respect the principle of proportionality as regards the punishment. The fine imposed on the applicant (2,000 EUR) and the costs which she had to bear (640 EUR) were high. She had to publish her apologies on the Internet site of the Polish Press Agency and in the local edition of a newspaper. Furthermore, the criminal conviction had a negative impact on the applicant's career as a lawyer and academic. In case of a second conviction the applicant would lose her job as a lecturer. Further, the mayor requested both of the applicant's employers to institute disciplinary proceedings against her. The conviction also had enormous emotional impact on the applicant. She started losing her voice and faced difficulties in lecturing. Her habilitation examination had to be postponed twice due to her health problems.

45. The applicant concluded that there had been a violation of Article 10 in her case.

2. The Government's submissions

46. The Government argued that the interference with the applicant's right to freedom of expression had been compatible with the terms of Article 10. The interference was prescribed by law, being based on Article 212 of the Criminal Code and pursued a legitimate aim, i.e. the protection of the reputation or rights of others. The statement that the mayor had put "extralegal pressure on the prosecution service" was directed against his personal dignity and had debased him.

47. With regard to the issue of whether relevant and sufficient reasons had been put forward to justify the interference, the Government submitted that it had been for the national authorities to assess whether there existed a "pressing social need" for the restriction at issue and, when making that assessment, they enjoyed a certain margin of appreciation. In the present case both the domestic courts provided detailed reasoning for their decisions and their finding that the applicant's statements had amounted to defamation.

48. The District Court noted in its exhaustive reasoning running to 86 pages that the evidence in the case had left no doubt that the applicant had committed the offence of defamation by means of mass communication (Internet) specified in Article 212 § 2 of the CC. It further noted that the applicant had failed to demonstrate the truthfulness of her statement and thus had not made out the defence referred to in Article 213 of the CC.

49. The trial court further observed that the applicant had been in a long-standing conflict with the mayor and on numerous occasions she had requested the prosecution service to investigate cases in which the mayor had allegedly broken the law. In some of the investigations she had succeeded in having the case remitted or reopened; however not a single case had concluded with the filing of a bill of indictment. The applicant, who had a law degree, should have assessed the situation in a more objective manner rather than act under her aversion to the mayor.

50. The District Court further found that the applicant's statement had not been protected by Article 10 of the Convention. Even if the Court had repeatedly stressed that the boundaries of acceptable criticism were wider in the case of politicians, this did not mean that they were deprived of the protection of their reputation. Everyone had the right to express their opinions about the actions of public authorities, but this right did not extend to formulating unjustified and unproved factual allegations. Furthermore, the applicant's statement had clearly pejorative connotations, based on her unjustified interpretation of facts.

51. The trial court's judgment was upheld by the Kraków Regional Court which confirmed that the applicant had failed to prove the truthfulness of her statement. It further held that a defamatory statement which had deliberately employed untrue information was not protected by

Article 10. In the Government's opinion all of the above considerations represented "relevant and sufficient" reasons.

52. With regard to the proportionality of the penalty, the Government maintained that the fine of PLN 7,500 imposed on the applicant and the obligation to pay the other party's costs should be considered proportionate to the applicant's degree of guilt and the social danger of her act.

53. In conclusion, the Government submitted that there had been no violation of Article 10 in the case. The intervention of the domestic courts was necessary in order to react appropriately to defamatory accusations devoid of foundation or formulated in bad faith.

3. *The Court's assessment*

54. It was common ground between the parties that the applicant's conviction and punishment constituted an interference by a public authority with her right to freedom of expression.

55. Such interference will be in breach of Article 10 if it fails to satisfy the criteria set out in its second paragraph. The Court must therefore determine whether it was "prescribed by law", pursued one or more of the legitimate aims listed in that paragraph and was "necessary in a democratic society" to achieve that aim or aims.

56. The Court finds, and this has not been disputed, that the interference was "prescribed by law", namely by Articles 212 and 213 of the Criminal Code. It further pursued the legitimate aim of protecting "the reputation or rights of others".

57. It remains to be established whether the interference was "necessary in a democratic society". This determination must be based on the following general principles emerging from the Court's case-law (see, among other authorities, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 88-91, ECHR 2004-XI, with further references):

(a) The test of "necessity in a democratic society" requires the Court to determine whether the interference corresponded to 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 delivered by independent courts. 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.

(b) The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken 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 or 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, including

the content of the statements held against the applicant and the context in which he or she has made them.

(c) In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were relevant and sufficient and whether the measure taken was proportionate to the legitimate aims pursued. In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10.

(d) The Court must also ascertain whether the domestic authorities struck a fair balance between the protection of freedom of expression as enshrined in Article 10 and the protection of the reputation of those against whom allegations have been made, a right which, as an aspect of private life, is protected by Article 8 of the Convention.

58. In the instant case, the applicant, prompted by the mayor's appeal to the President of the Republic and the article published by the Polish Press Agency, wrote a letter which was subsequently published on the Agency's website (see paragraphs 12-14 above). She described a specific case in which the mayor had been the subject of an investigation and had been charged with alleged fraud. That investigation was subsequently discontinued. The applicant deplored the hostile criticism of the named prosecutor and the police officer expressed in the statement of the municipal council which had been authored by the mayor. Referring further to two ongoing investigations which concerned financial irregularities established by the Regional Audit Chamber, she asserted that "these [criminal] proceedings conducted by the prosecution service have been artificially prolonged, which prompts me to say that the mayor is putting extralegal pressure on that authority".

59. The domestic courts found the applicant guilty of defamation committed through the mass media on account of the above statement. In their view, that statement suggested that the mayor had acted illegally and had resorted to bribery or threats in order to influence decisions of a public authority (see paragraphs 20 and 23 *in fine* above). Thus, for the domestic courts, the applicant imputed to the mayor behaviour which could denigrate him in the eyes of the public and undermine the public confidence necessary for the discharge of his duties.

60. The applicant was a local politician and at the relevant time she was a councillor from the opposition group in the municipal council. The Court recalls that while freedom of expression is important for everybody, it is especially so for elected representatives of the people. They represent the electorate, draw attention to their preoccupations and defend their interests. Accordingly, interferences with their freedom of expression call for the closest scrutiny on the part of the Court (see, *Castells v. Spain*, 23 April 1992, § 42, Series A no. 236; *Jerusalem v. Austria*, no. 26958/95,

§ 36, ECHR 2001-II; *Lombardo and Others v. Malta*, no. 7333/06, § 53, 24 April 2007; *Kubaszewski v. Poland*, no. 571/04, § 38, 2 February 2010).

61. The Court notes that the applicant took part in the discussion regarding the manner in which the mayor exercised his duties, including the management of public funds. Those issues were a matter of general interest to the community and discussing them formed part of a political debate.

62. The Court underlines that the analysis of the applicant's case cannot be limited to one isolated passage from her letter, but must take into account the context in which it was made. In her letter, the applicant intended to show the mayor's attitude to situations in which he came under the critical scrutiny of other authorities, like the prosecution service or auditing services. That attitude, in the applicant's view, consisted of going on the offensive against those authorities. She illustrated her belief with two examples. The first was the statement of the municipal council – adopted on the mayor's initiative – in response to the investigation into the alleged case of fraud by the mayor in which the council alleged that the police and the prosecution service had acted unlawfully. The second was the reference to the mayor's appeal to the President of the Republic to reform the allegedly unconstitutional Regional Audit Chambers, which followed on from the very critical assessment of the management of the municipal funds by the mayor.

The Court considers that it was legitimate for the applicant in the context of a public debate to point out that the mayor had acted in an unorthodox manner by proposing to the council to adopt a statement virulently criticising the authorities which had conducted the investigation against him. It was equally justified to call into question the mayor's reaction to the negative assessment of his financial management made by the Regional Audit Chamber. However, the domestic courts, when examining the charge against the applicant, failed to have regard to this wider context.

63. The Court recalls that in assessing whether there was a "pressing social need" capable of justifying an 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 *Lingens v. Austria*, 8 July 1986, § 46, Series A no. 103; *De Haes and Gijssels v. Belgium*, 24 February 1997, § 42, *Reports of Judgments and Decisions* 1997-I).

64. The domestic courts focused their analysis on the issue of the alleged extralegal pressure exerted by the mayor on the prosecution service and categorised it as a statement of fact. In so doing, they concentrated on the literal meaning of the impugned assertion and analysed it without having regard to the wider message which the applicant had tried to convey in her letter. The applicant disputed the characterisation of her assertions by the domestic courts and claimed that the impugned passage was a value

judgment, emphasising the use of the term “prompts me to say”. The Court accepts that it may sometimes be difficult to distinguish between assertions of fact and value judgments. However, in the present case, the Court is unable to follow the domestic courts’ position and finds that there are sufficient arguments to consider that the impugned assertion, taken against the background of the letter as a whole, should be regarded as a value judgment. The important issue to be borne in mind is the overall context in which the applicant made her statement. She adverted in her article to “the extralegal pressure on the prosecution service”, explicitly referring to the earlier case when the municipal council had harshly attacked in its statement the prosecutor who had conducted the investigation against the mayor. It is to be noted that the term “extralegal” as used by the applicant was exactly the same as the term employed in the statement of the municipal council. Furthermore, she referred to the applicant’s criticism of the regional audit chambers, which had earlier censured the management of municipal funds by the mayor.

The domestic courts found that the applicant’s assertion of “putting extralegal pressure on the prosecution authorities” was to be understood as a statement that an offence had been committed. For them such an assertion could only be associated with the criminal offence of bribery or unlawful threats (see paragraphs 20 and 23 *in fine* above). However, having regard to the overall context, the Court does not accept that interpretation. It was shown by the applicant in her letter that “the extralegal pressure” had a broader meaning, including attempts to influence the prosecutors by other means – not necessarily criminal acts – such as by the statement of the municipal council.

65. The Court recalls that, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (see *De Haes and Gijssels*, cited above, § 47; *Oberschlick v. Austria (no. 2)*, judgment of 1 July 1997, *Reports* 1997-IV, p. 1276, § 33; *Jerusalem*, cited above, § 43). However, having regard to the gist of the applicant’s letter, the Court finds that the impugned assertion was underpinned by a sufficient factual basis.

66. Furthermore, the Court recalls that the limits of acceptable criticism are wider with regard to politicians acting in their public capacity than in relation to private individuals, as the former inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large (see *Lingens*, § 42; *Oberschlick v. Austria (no. 2)*, both cited above, § 29; *Mamère v. France*, no. 12697/03, § 27, ECHR 2006-XIII; *Kwiecień v. Poland*, no. 51744/99, § 47, 9 January 2007). Politicians must display a greater degree of tolerance, especially when they themselves make public statements that are susceptible to criticism. In the present case that was

precisely so. As mentioned above, the mayor had personally authored disrespectful remarks about the named prosecutor and the police officer.

67. The Court agrees that the applicant's statement contained harsh words about the mayor. However, it was precisely the task of an elected representative to ask awkward questions about those who exercise public office and to be hard-hitting in her criticism of fellow politicians responsible for the management of the public purse. The latter must be expected to display a greater degree of tolerance than private individuals when exposed, in a political setting, to scathing remarks about their performance or policies (see, *mutatis mutandis*, *Lombardo and Others*, § 54; *Kubaszewski*, both cited above, § 43). The Court reiterates its view expressed in numerous judgments that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned (see, among many authorities, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV and *Feldek v. Slovakia*, no. 29032/95, § 83, ECHR 2001-VIII).

68. In so far as the applicant contends that in criminal defamation cases the domestic courts generally failed to distinguish between statements of fact and opinions and that Article 212 § 2 of the CC was used by politicians to silence the media, the Court reiterates that in cases arising from individual petitions the Court's task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised by the case before it (see *The Holy Monasteries v. Greece*, 9 December 1994, § 55, Series A no. 301-A; *Amann v. Switzerland* [GC], no. 27798/95, § 88, ECHR 2000-II).

69. Lastly, the Court reiterates that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference. While the use of criminal-law sanctions in defamation cases is not in itself disproportionate (see, *Radio France and Others v. France*, no. 53984/00, § 40, ECHR 2004-II; *Lindon, Otchakovsky-Laurens and July*, cited above, § 59; *Długolecki v. Poland*, no. 23806/03, § 47, 24 February 2009), the nature and severity of the penalties imposed are factors to be taken into account, because they must not be such as to dissuade the press or others who engage in public debate from taking part in the discussion of matters of legitimate public concern (see, *Cumpănă and Mazăre*, cited above, § 111).

70. In the instant case, the applicant was sentenced to a fine of 7,500 PLN (1,900 EUR) and ordered to publish the judgment on the Internet site of the Polish Press Agency for a period of two weeks and once in a local edition of the daily *Dziennik Polski*. She was further ordered to reimburse various costs in the aggregate amount of EUR 740. The Government pleaded that the sanctions at issue were proportionate in the

circumstances. However, the Court considers that the sanctions imposed on the applicant constituted a reprimand for the exercise of her right to freedom of expression. The cumulative effect of a criminal conviction and the aggregate amount of the financial penalties could be considered as having had a chilling effect on the exercise by the applicant of her freedom of expression as it was capable of discouraging her from making statements critical of the mayor's handling of his duties in the future (see, *mutatis mutandis*, *Lombardo and Others*, cited above, § 61).

71. In the light of the above considerations and taking into account the fact that the case concerned political speech, the Court finds that the use of the passage in issue, referring to the mayor's conduct, did not exceed the limits of acceptable criticism. The reasons adduced by the courts were not "relevant and sufficient" to justify the interference in issue and the standards applied by them were not fully compatible with those embodied in Article 10. Therefore, the Court considers that the domestic courts overstepped the narrow margin of appreciation afforded to them to restrict political speech. It must be concluded that the interference was disproportionate to the aim pursued and not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

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

II. OTHER ALLEGED VIOLATION OF THE CONVENTION

73. The applicant also alleged a breach of Article 6 § 1 in conjunction with Article 6 § 3 (d) of the Convention. She claimed that the trial court had not studied the files of the investigations which had formed the basis of her critical opinion about the mayor. Furthermore, the Regional Court had wrongly refused to hear evidence from R.M. which supported the applicant's claim that extralegal pressure had been exerted by the mayor on prosecutors.

74. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that the above complaint does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

75. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. Article 41 of the Convention provides:

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

A. Pecuniary damage

77. The applicant claimed EUR 2,600 in respect of pecuniary damage for the alleged breach of Article 10 of the Convention. That overall sum corresponded to the amount of the fine imposed on the applicant and various costs she had been ordered to reimburse in the domestic proceedings (see paragraphs 19 and 29 above).

78. The Government disputed the claim as exorbitant and partly irrelevant.

79. The Court observes that the applicant suffered pecuniary damage in that she was ordered to pay the above amount as a consequence of her conviction and sentence. It therefore awards the applicant the amount sought in full, having regard to the direct link between the above claim and the violation of Article 10 found by the Court (see, *Hrico v. Slovakia*, no. 49418/99, § 55, 20 July 2004; *Kwiecień*, cited above, § 66).

B. Non-pecuniary damage

80. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage for suffering and distress occasioned by the violation of her right to freedom of expression. She argued that the said violation had serious consequences for her professional life since she had been threatened with dismissal from her post at the university. In addition, her state of health deteriorated as a result of the conviction.

81. The Government contested the claim. In the alternative, they submitted that a finding of a violation would constitute sufficient just satisfaction in respect of non-pecuniary damage.

82. The Court accepts that the applicant suffered non-pecuniary damage – such as distress and frustration resulting from the conviction and sentence – which is not sufficiently compensated by the finding of a violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 3,000 under this head.

C. Costs and expenses

83. The applicant claimed EUR 500 for administrative costs (photocopying, translation, postal, facsimile and telephone communications) in respect of the proceedings before the Court. Further, the applicant's representative claimed EUR 750 for fifteen hours of work on the case. She submitted that the legal fees, if awarded, would be devoted to the work of her non-governmental organisation.

84. The Government submitted that any award should be limited to those costs and expenses which were actually and necessarily incurred and were reasonable.

85. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the above criteria, the Court considers it reasonable to award the sum of EUR 100 in respect of administrative costs incurred by the applicant for the proceedings before the Court. In so far as the legal fees of the representative are concerned, the Court notes that the applicant failed to produce any documents showing that the sum claimed had been incurred, i.e. that the applicant paid them or was bound to pay them pursuant to a contractual obligation (cf. § 18 of the Practice Direction on Just Satisfaction Claims issued by the President of the Court). Accordingly, it rejects this part of the claim for costs and expenses.

D. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning Article 10 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted

into the currency of the respondent State at the rate applicable at the date of settlement:

- (i) EUR 2,600 (two thousand six hundred euros), plus any tax that may be chargeable, in respect of pecuniary damage;
- (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (iii) EUR 100 (one hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 18 September 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

David Thór Björgvinsson
President