



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

FIRST SECTION

CASE OF MALISIEWICZ-GĄSIOR v. POLAND

(Application no. 43797/98)

JUDGMENT

STRASBOURG

6 April 2006

FINAL

06/07/2006

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 Malisiewicz-Gąsior v. Poland,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs F. TULKENS,

Mr P. LORENZEN,

Mrs N. VAJIĆ,

Mrs S. BOTOCHAROVA,

Mr L. GARLICKI, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 16 March 2006,

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

PROCEDURE

1. The case originated in an application (no. 43797/98) against the Republic of Poland lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mrs Izabela Malisiewicz-Gąsior (“the applicant”), on 20 October 1997.

2. The Polish Government (“the Government”) were represented by their Agents, Mr K. Drzewicki, and subsequently, Mr. J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that the right of freedom of expression was violated in her case.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 29 January 2004 the Court declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1950. She is a choreographer and lives in Łódź, Poland.

1. The prosecution of the applicant on charges of kidnapping

(a) Events of 10 and 11 June 1992

8. On 10 June 1992 at 11 p.m. Mr Andrzej Kern, at that time the Deputy Speaker of the Sejm, made a formal notification of the commission of an offence (*zawiadomienie o popełnieniu przestępstwa*) to the Łódź Regional Prosecutor, E.S., alleging that the applicant and her husband had kidnapped his 17-year-old daughter, M.K. The applicant submitted that the allegation was false as M.K. had in fact run away from home and had only been accompanied by the applicant's son who had been her boyfriend for a long time. M.K. had previously run away from home on several occasions because of conflicts with her parents. Prosecutor E.S., who – according to the applicant – was a friend of Mr Kern, immediately instructed the Łódź Deputy Regional Prosecutor E.C. to take charge of the case.

9. On the same day, i.e. 10 June 1992, the prosecutor E.C. signed a warrant authorising the search of the applicant's flat. The warrant was intended to search the flat for M.K. and for drugs. On 11 June 1992 prosecutor E.C. signed an order allowing the tapping of the applicant's telephone.

10. On 11 June 1992 at 1 a.m. the applicant's husband went to his cottage situated in the suburbs of Łódź. He was arrested by police officers who then searched the cottage. Prosecutor E.S. and Mr Kern were present at the scene. Subsequently, the applicant's husband was taken to the Łódź Regional Police Station, where he was detained overnight.

11. On 11 June 1992 at 4 a.m. police officers searched the applicant's flat in her presence. However, they did not find either M.K. or drugs. The police officers advised the applicant that her husband had been detained and served her with a summons to report on the same day at 12 noon to the Regional Police Station for questioning.

12. In the morning of 11 June 1992 the applicant's husband was taken handcuffed to the premises of the regional prosecution service. He was questioned by prosecutors E.S. and E.C.. Mr Kern was present during the questioning. The applicant's husband was released after the questioning.

(b) The detention of the applicant

13. The applicant failed to report for questioning on 11 June 1992. She submitted to the police a letter explaining that she had to care for her daughter who was ill. Subsequently, the applicant failed to report for questioning on 15 and 17 June 1992. On 23 and 24 June 1992 police officers tried to serve a summons on the applicant, but could not find her at her place of residence.

14. On 25 June 1992 prosecutor E.C. charged the applicant with kidnapping and signed an arrest warrant for her. Prosecutor E.C. also charged the applicant's son with kidnapping.

15. On 29 June 1992 the applicant was taken into custody. She was detained in the Łódź prison hospital, apparently in the psychiatric ward.

16. On 1 and 2 July 1992 the applicant was questioned by prosecutor E.C. She was also confronted with Mr Kern.

17. In the afternoon of 2 July 1992 the applicant was released from detention.

(c) The end of the criminal proceedings against the applicant

18. On 30 June 1992 the applicant applied for a transfer of her case to a prosecutor who worked outside the Łódź region. On 4 August 1992 the Ministry of Justice advised her that the application had been allowed and that her case had been taken over by the Poznań Regional Prosecutor R.G.

19. On 16 September 1992 prosecutor R.G. decided to discontinue the criminal proceedings against the applicant and her son. He considered that they had not kidnapped M.K. The prosecutor referred to the statement taken from M.K. who testified that it had been her decision to run away from home and that she had asked the applicant's son to accompany her.

20. Mr Kern and his wife lodged appeals against the decision to discontinue the criminal proceedings against the applicant and her son, but on 15 February 1993 prosecutor B.M. of the Ministry of Justice dismissed them. The prosecutor considered that the allegations of kidnapping were groundless.

(d) The publicity surrounding the case

21. The case concerning the alleged kidnapping of M.K. received wide coverage in the media.

2. The applicant's campaign in the parliamentary elections

22. In 1993 the applicant stood as an independent candidate in the parliamentary elections.

23. On 22 August 1993 she published an article in the weekly newspaper "Angora". The first half of the article, which was published in a section entitled "Pre-election Pranks", read as follows:

“WHY?”

I am an independent candidate for the Senate, not connected to any ‘networks’, relations or obligations. The fact that I am described in the press and television as ‘a mother-in-law of M. K.’ probably shows that the authors cannot mention names since they use such a euphemism. It is not my achievement and it was not a result of my efforts that we have become a family with Mr Kern. It can be explained by my son and his wife, if it is important ...

In order to explain the origin of the idea of standing in the elections to the Senate I have to go back to the events which took place a year ago. At that time, I learned at my cost what the abuse of power meant! The Deputy Speaker of the Sejm at that time, directed by emotions and personal animosities, made the persons responsible for respecting the law – the Regional Prosecutor and his Deputy, and even the Minister of Justice – breach the law because of ‘the solidarity of colleagues’. I was arrested, detained in a psychiatric cell, my flat was provocatively searched for ‘drugs’, my telephone calls were tapped, a car damaged. After such compromising events, a politician of such a calibre in the West would have had to leave. But here he still felt good – and the Sejm decided not to dismiss him! I can imagine what sort of arrangements must have existed in the Sejm to make such a decision! I was so shocked by this that I was ready to go abroad as nothing could be changed. A turning point came when the President dissolved the Parliament. People started to telephone and write letters asking me to stand in the elections. They were saying that the events which had taken place a year ago showed that I could fight. I am convinced that I am not the only one touched by the breaches of the law committed by the representatives of ‘the new democracy’. However, the law is the same for everybody, regardless of whether somebody is in power or is ‘an ordinary man’. This fundamental rule of democracy must be respected!”

24. The second half of the article described the applicant’s ideas about working in the Senate.

25. On 5 September 1993 the applicant published in the same weekly the following article:

“ABOUT ME

The first years of my professional life were dedicated to art. As a dancer and a choreographer I worked with numerous theatres and cultural centres – both in Poland (among others the Łódź Grand Theatre), and abroad. I also worked as a pedagogue with children and young people. In 1981 I started to run a private business and presently I am a co-owner of a company ‘AVATAR’. I have two children: a 22-year old son ... and a 6-year old daughter ..., my husband – Jan – is an actor. I did not belong to any political party. I did not participate actively in politics ...

In the summer of 1992 events took place which changed my attitude to the world. The abuse of authority, which I experienced, has made it impossible for me to stand idly on the sideline and watch people who should be the guardians of the law, breaking it ruthlessly for the sake of their private interests. After all, precisely that was done to me by the former Deputy Speaker of the Sejm, the former Minister of Justice, the former Regional Prosecutor and his former deputy.

It is not by chance that today for some malicious people it is not important that I am an independent candidate for the Senate but only that I can be called the

mother-in-law of M. K. [in bold in original]. They are not interested in the fact that a year ago I was arrested groundlessly and imprisoned – purposely! – in a psychiatric cell, that my home was searched on the pretext of ‘looking for drugs’, that after my release I was followed, my telephone calls were tapped and my car damaged, causing me constant mental pressure! All this happened in a country in which a western-style democracy had just set in!

Today the Vice Minister of Justice sees ‘clear pressure brought by the Deputy Speaker Kern on the Łódź prosecution service’, and there are criminal proceedings pending against its former employees.

I am a strong person. I have endured... However, I do not want any other innocent person to suffer similar harassment. **There must be justice and equality before the law – regardless of whether somebody is ‘the man in the street’ or the Deputy Speaker of the Sejm! I know that I can fight and win! I have remained independent! That is why I have decided to enter the political arena!** [in bold in original].”

26. In election broadcasts on the Łódź local radio station on 6, 9 and 15 September 1993 the applicant made the following statement:

“A turning-point came last year. You remember that story, it was well-known in the whole of Poland, although I did not cause it. At that time, I realised to my cost what the abuse of power meant. The Deputy Speaker of the Sejm at that time, directed by emotions, made the Regional Prosecutor, his Deputy, and even the Minister of Justice breach the law because of the solidarity of colleagues. I was arrested, detained in a psychiatric cell, my flat was provocatively searched for drugs, my telephone calls were tapped, a car damaged. All this because the daughter of Mister Deputy Speaker decided to spend holidays with my son without her daddy’s permission. Until then I had thought that such behaviour had been possible only in the Stalinist era.”

27. In election broadcasts on the Łódź local television station on 13 and 16 September 1993 the applicant made the following statement:

“The abuse of authority, which I experienced, has made it impossible for me to stand on the sideline and idly watch people, who should be the guardians of the law, breaking it ruthlessly for the sake of their private interests. Precisely that was done to me by the former Deputy Speaker of the Sejm, the former Regional Prosecutor and his deputy. Today, there are criminal proceedings pending against them. I am a strong, enduring person, however I do not want any other innocent person to suffer similar harassment.”

3. The prosecution on charges of defamation

(a) The private bill of indictment

28. On 27 September 1993 Mr Kern lodged with the Łódź District Court a private bill of indictment. He charged the applicant with seven counts of defamation (*zniesławienie*) under Article 178 § 2 of the Criminal Code. In particular, Mr Kern alleged that the applicant had published the above articles and had broadcast the above election statements “in order to debase

in the public opinion the Deputy Speaker Andrzej Kern and to expose him to loss of the trust necessary to perform his public and political functions.”

(b) The trial

29. The applicant was tried by the Skierniewice District Court between 22 May 1995 and 18 March 1996. On 19 March 1996 she was convicted for having made on television, radio and in the press, between 22 August and 16 September 1993, statements that “Mr Kern directed by emotions, made the Regional Prosecutor, his Deputy, and even the Minister of Justice breach the law because of the solidarity of colleagues” and that “today there are criminal proceedings pending against him”. The trial court considered that her publications and statements constituted a single continuous offence of defamation. By making the above statements, the applicant “defamed Andrzej Kern and made untrue allegations which could have debased the victim in the public opinion and exposed him to loss of the trust necessary to perform the functions of Deputy Speaker of the Sejm of the Republic of Poland and other public functions as well as to work as a lawyer-advocate”.

30. As regards the first statement that “Mr Kern directed by emotions, made the Regional Prosecutor, his Deputy, and even the Minister of Justice breach the law because of the solidarity of colleagues” the trial court considered that even though Mr Kern personally made a formal notification of the commission of an offence to the prosecutor E.C., nevertheless, the prosecutors E.S. and E.C. acted independently when they made their decisions concerning the applicant’s case. The court noted that it was the right of every citizen to lodge a request to prosecute somebody and, therefore, the applicant’s statement that it constituted “a breach of law for the private interest” had been untrue.

The court then examined the merits of the applicant’s allegations that she had been “arrested, detained in a psychiatric cell, [her] flat was provocatively searched for drugs, telephone calls were tapped, a car damaged.” The District Court established that warrants given by the prosecutor to arrest her, search her flat and tap her telephone calls were given in accordance with the law, however, it acknowledged that the prosecutor should have considered other preventive measures than arrest in order to interrogate the applicant. In sum, the court found as unsubstantiated the allegation that Mr Kern suggested, ordered, or in other manner “made the prosecutor to give decision to detain the applicant on remand”.

31. With respect to the statement broadcast on 13 and 16 September 1993 the court observed that: “between 22 August and 16 September 1993 there were no criminal proceedings pending against Andrzej Kern. In fact, the criminal proceedings against him were initiated only on 22 December 1993. On that date he was charged with having committed against M. K. a crime described in Article 168 of the Criminal Code. The victim filed written information about that crime on 11 October 1993 ...”

32. The trial court concluded that there was no evidence that while the applicant made the statements in question she “had a belief based on a well-founded basis that the allegations were true and that she was defending a socially justified interest”.

33. The applicant was sentenced to eighteen months’ imprisonment suspended for five years. Moreover, the court ordered the applicant to pay for the publication of the judgment in two national dailies and a local newspaper. She was also ordered to make at her own expense, in the newspaper “Angora” and on the Łódź radio and television stations, following apologies: “the allegations made in respect of Andrzej Kern between 22 August 1993 and 16 September 1993 in those media during her election campaign that the criminal proceedings against him were pending and that he had made the Regional Prosecutor, his Deputy and the Minister of Justice breach the law, were untrue.” Finally, the applicant was ordered to reimburse the private prosecutor 800 Polish zlotys (PLN) for the costs of the proceedings and to pay a PLN 75 fee to the State Treasury.

(c) The appellate proceedings

34. The applicant appealed to the Skierniewice Regional Court against her conviction. On 18 November 1997 the court gave a judgment in which it upheld her conviction but changed the sentence. The applicant’s prison term was lowered to one year suspended for three years. She was ordered to pay for the publication of the judgment in one national daily and the announcement containing her apologies in the weekly “Angora”. Moreover, the applicant was ordered to reimburse the private prosecutor PLN 480 for the costs of the appellate proceedings and to pay a PLN 90 fee to the State Treasury.

35. The appellate court considered that the trial court’s assessment of facts and legal reasoning were correct. The court stressed that in order to find that there was no offence of defamation, all three conditions set out in Article 179 § 2 must be fulfilled jointly. It further stated:

“...Turning to the instant case, it should be considered that even if [the applicant] proved that her statements directed against Mr Kern were true or that she had a belief based on a well-founded basis that the allegations were true, that in any event, would not justify the trial court to apply Article 179 § 2. The first-instance court rightly found that the action of I. Malisiewicz-Gąsior directed against A. Kern was an element of her election campaign, aiming at ‘promoting’ ... her own person, in order to obtain a positive election result...Therefore, [the applicant] could not be said to have been defending a socially justified interest, as she had been trying to achieve her private objective...”

36. Nevertheless, the Regional Court found that the sentence imposed on the applicant by the trial court was too harsh. In this connection the court established as follows:

“...The appellate court considers that, in deciding the severity of the criminal measures against the applicant, her particular psychological situation - since the beginning of all criminal proceedings against her - should have been taken into consideration. It is beyond doubt that she could have subjectively felt that the [prosecuting] authorities had been overactive, which was not without influence on her being able to control her emotions and on her motivations.”

(d) The cassation appeal

37. The applicant could not afford to hire a lawyer to lodge a cassation appeal and therefore she applied to the Minister of Justice and the Ombudsman to lodge a cassation appeal against her conviction. On 15 December 1998 the Ombudsman allowed her application and filed with the Supreme Court a cassation appeal against the judgment of the Skierniewice Regional Court.

38. The Ombudsman submitted that the courts had failed to take into account evidence pointing to the fact that “the inadequacy of the actions of the police and the prosecution service in respect of herself and her family in the case concerning the kidnapping of M. K. could have led [the applicant] to the justified belief that her allegations concerning Mr Kern had been true and that she had been ‘defending a socially justified interest’”. In this connection, the Ombudsman stated in his appeal that:

“Furthermore, the courts’ view that the defendant was not defending a socially justified interest because she was participating in her own election campaign and aiming in the first place to achieve her own private objective is not supported by the evidence which was collected and disclosed at the hearing.

The participation in one’s own election campaign cannot be an obstacle to speaking on the subject of ensuring respect for the law by institutions and public personalities. What is more – an election campaign invariably constitutes a period of public statements on important social issues, which certainly include the respect for the law, especially by institutions and persons especially obliged to do so.

It is therefore difficult to consider that it was the defendant’s intention to promote herself and not – by using the opportunity to speak publicly – pointing, on the basis of her own experience, to the danger of breaking the law by a public institution as a result of yielding to the pressure of public personalities.”

39. The Ombudsman further submitted that prosecutors E.S. and E.C. had broken the law. He relied on the files on the disciplinary proceedings taken against both prosecutors.

40. Finally, the Ombudsman challenged the courts’ assessment of part of the evidence.

(e) The Supreme Court’s decision

41. On 1 December 2000 the Criminal Section of the Supreme Court dismissed the cassation appeal. Its reasoning ended with the following conclusion:

“The irresistible conclusion is that the submissions made in the cassation appeal, formally of a procedural nature, concern in fact the allegation of an error in the assessment of facts taken as the basis for the decision and the assessment of evidence, which is not allowed in cassation proceedings.

Cassation proceedings cannot be transformed into third-instance proceedings dedicated to further consideration of all aspects of the submissions made in the appeal, which have already been analysed by the appellate court. (...)”

(f) The enforcement of the sentence

42. In the meantime, on 24 August and 28 September 2000 the Skierniewice District Court held hearings on the enforcement of the applicant’s prison sentence as she had failed to apologise to Mr Kern. The applicant did not attend the hearings.

43. On 23 October 2000 the Skierniewice District Court decided not to enforce the suspended prison sentence imposed on the applicant.

II. RELEVANT DOMESTIC LAW

The Criminal Code 1969

44. Article 178 of the Criminal Code 1969 read as follows:

“§ 1. Anyone who imputes to another person, a group of persons or an institution such behaviour or characteristics, which may debase them in the public opinion or expose to loss of the trust necessary for a certain position, occupation or a type of activity, shall be liable to imprisonment not exceeding 2 years, a restriction of liberty or a fine.

§ 2. Anyone who raises or makes public untrue allegation about behaviour or characteristics of another person, a group of persons or institutions in order to debase them in the public opinion or expose to loss of the trust necessary for a certain position, occupation or a type of activity, shall be liable to imprisonment not exceeding 3 years.

(...)

§ 4. The prosecution takes place under a private bill of indictment.”

Pursuant to Article 179:

“§ 2. There is no offence described in Article 178 § 1 if:

1) an allegation made publicly is true and the offender acts in the defence of a socially justified interest or has a belief based on a well-founded basis that he is defending such an interest, or

2) the offender makes an allegation publicly and has a belief based on a well-founded basis that the allegation is true and that he is defending a socially justified interest.

§ 3. Non-existence of an offence resulting from the reasons described in §§ 1 and 2 does not exclude the offender's liability for defamation because of the form in which an allegation was made or made public."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

45. The applicant complained that her conviction for defamation had breached her right to freedom of expression as guaranteed by 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. Existence of the interference

46. The Court first finds that it is clear and undisputed that there has been an interference with the applicant's right to freedom of expression in that the applicant was convicted by the relevant courts of defamation and sentenced to a suspended prison term.

B. Whether the interference was justified

47. This interference contravenes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. Therefore, it needs to be determined whether the interference was "prescribed by law," pursued one or more of the legitimate aims referred to in paragraph 2 of Article 10, and was "necessary in a democratic society".

1. “Prescribed by law”

48. The Court finds, and this was not disputed before it, that the interference was “prescribed by law,” the applicant’s conviction having been based on Article 178 of the Criminal Code (see paragraph 44 above).

2. Legitimate aim

49. The Court agrees with the Government’s submissions that the interference with the applicant’s freedom of expression was intended to pursue a legitimate aim referred to in Article 10 § 2 of the Convention, namely to protect “the reputation or rights of others”.

3. Necessary in a democratic society

(a) Arguments before the Court

(i) The applicant

50. The applicant submitted that she acted in the public interest. The fact that she stood as a candidate in the parliamentary elections could not prevent her from speaking on the subject of the lawfulness of the actions of public personalities or institutions. The applicant also criticised the conclusions of the trial and appellate courts.

51. She argued that her statements about the abuse of power committed by Mr Kern were justified in view of her experience of the criminal proceedings initiated against her on charges of kidnapping. Moreover, taking into account the circumstances of that case, the applicant’s statements were made in “a cultural and delicate manner”.

(ii) The Government

52. The Government pointed out that the trial court had found that the applicant’s allegations had been untrue. In particular, no criminal proceedings were pending against Mr Kern when the applicant made her statements. Moreover, the trial court considered that the prosecutors in charge of the applicant’s case were independent and did not act under the influence of Mr Kern.

The Government further observed that:

“The Skierniewice District Court as well as the Skierniewice Regional Court duly examined whether in the case there existed exonerating circumstances as indicated in Article 179 § 2 (2) of the Criminal Code of 1969 (i.e. whether the ... applicant had a well-founded basis for believing that the statements she made were true and that she was defending a socially justified interest). As was underlined by the second instance court, pursuant to the Polish law the burden of proof with reference to the above circumstances lay with the ... applicant. However, the ... applicant did not submit any reliable evidence to show that her defamatory allegations were true and that she had made them in defence of a justified social interest. Moreover, the context and

circumstances in which the ... applicant made the defamatory statements clearly proved that the ... applicant's aim was exclusively to promote her own person for the purpose of the election campaign."

53. The Government submitted that the applicant's conviction and sentence were justified by a "pressing social need" and were proportionate to the legitimate aim pursued. With respect to the applicant's suspended prison sentence, the Government emphasised that it was not enforced and therefore the applicant "did not suffer any negative consequences for her failure to publish apologies to Mr Kern".

54. The Government further pointed out that all European legal systems provided for defamation as a criminal offence. Moreover, they argued that the untrue allegations made by the applicant in the instant case were not protected by Article 10.

55. The Government concluded that the reasons given by the Polish courts for the applicant's conviction were "relevant and sufficient" and that the application was manifestly ill-founded. Alternatively, they submitted that there was no violation of Article 10 in the present case.

(b) The Court's assessment

(i) The relevant principles

56. The Court reiterates that freedom of expression, as secured in paragraph 1 of Article 10, 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, 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 that 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 (see, among many other authorities, *Oberschlick v. Austria* (no. 1), judgment of 23 May 1991, Series A no. 204, § 57 and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

57. There is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV). Moreover, the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his words and deeds by journalists and the public at large, and he must consequently display a greater degree of tolerance (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 42, *Incal v. Turkey*, judgment of

9 June 1998, *Reports* 1998-IV, p. 1567, § 54; *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 30, ECHR 2003-XI).

58. The test of “necessity in a democratic society” requires the Court to determine whether the interference complained of 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 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 (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V, and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 88, 17 December 2004).

59. The Court’s task in exercising its supervisory function is not to take the place of the national authorities, but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation. In so doing, 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 based their decisions on an acceptable assessment of the relevant facts (see *Vogt v. Germany*, judgment of 26 September 1995, Series A no. 323, pp. 25-26, § 52, and *Jerusalem v. Austria*, no. 26958/95, § 33, ECHR 2001-II, with further references).

60. In addition, 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” (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). The Court must ascertain whether the domestic authorities struck a fair balance between, on the one hand, the protection of freedom of expression as enshrined in Article 10, and on the other hand, 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 (see *Chauvy and Others*, cited above, § 70 *in fine*).

(ii) *The application of the general principles to the above case*

61. In the present case the Court is called upon to determine whether the applicant’s conviction interfered with her freedom of expression in violation of Article 10 of the Convention.

62. In determining whether the reasons given by the national authorities to justify the applicant’s conviction were relevant and sufficient, the Court will review under Article 10 the decisions they have taken pursuant to their power of appreciation. In exercising its supervisory jurisdiction the Court must look at the interference with the applicant’s right to freedom of expression in the light of the case as a whole, including the statements

concerned, the context in which they were made and also the particular circumstances of those involved (see *Feldek v. Slovakia*, judgment of 12 July 2001, § 77).

63. Turning to the particular circumstances of the instant case, the Court notes that the applicant was convicted because she had published two articles in a weekly newspaper alleging that a well-known politician had abused power. The statements, which had also been broadcast on the local radio and television stations, were made by the applicant in August and September 1993 during her campaign as a candidate in the parliamentary elections. The national courts found that the statements were defamatory as they debased the victim in the public opinion and exposed him to loss of the trust necessary to perform the functions of Deputy Speaker of the Sejm of the Republic of Poland and other public functions. The domestic courts also established that those statements were untrue. In addition, the courts considered that it could not be said that the applicant had been defending a socially justified interest as she had been trying to achieve her private objective - to win the elections. In consequence, the domestic courts decided that the victim of the defamation needed to be protected. The applicant was convicted and sentenced to a suspended prison term and ordered to publish an apology.

64. The Court considers that a matter of particular importance for the determination of the present case is the importance of promotion of free political debate in a democratic society, that freedom being at the very core of the concept of a democratic society which prevails throughout the Convention (*Oberschlick v. Austria*, cited above, § 58).

65. The Court finds that the applicant's statements were made during her electoral campaign when she stood as a candidate for the Senate of the Republic of Poland. In addition to the statements involving Mr Kern, the applicant also explained her political convictions and her own ideas about working in the Senate.

The Court also notes that the applicant's statements about Mr Kern resulted from her personal experience gained in the course of criminal proceedings against her initiated at the request of that politician (see paragraphs 8-21 above). These proceedings concerned the alleged kidnapping of the daughter of Mr Kern, an important politician and the Deputy Speaker of the Sejm, which at that time got extensive media coverage in Poland. In the course of those proceedings the applicant was arrested, her house was searched, her telephone calls were tapped and she and her husband were detained on remand. In this respect, the Court points to the appellate court's finding that the applicant could have subjectively felt that the Łódź prosecutors had been overactive in her case and that it could have influenced her being able to control her emotions and motivations (see paragraph 36 above). Moreover, the Ombudsman, basing himself on the files of the disciplinary proceedings, considered that

prosecutors E.S. and E.C. had breached the law in the applicant's case. When the applicant's case was transferred to the Poznań Regional Prosecutor, the criminal proceedings against her concerning charges of kidnapping made by Mr Kern were discontinued and the prosecutor had considered that these charges were groundless.

66. In the light of the above, the Court considers that the applicant's allegations of abuse of power were not a gratuitous personal attack but were part of a political debate. Even if some of the statements contained harsh words, they were made against a well-known politician in regard to whom the limits of acceptable criticism are wider than as regards a private individual. The Court therefore 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 other authorities, *Feldek v Slovakia*, cited above, § 83 and *Süreç v. Turkey (no. 1)* [GC], cited above, § 61).

67. As regards the reasons given by the domestic courts, the Court notes that they established that the applicant had not been defending a socially justified interest because she had been participating in her own election campaign and "had been trying to achieve her private objective." The Court cannot subscribe to this view. It is of the opinion that the matters invoked by the applicant concerned issues of public interest. The Court reiterates 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, *Melnichenko v. Ukraine*, no. 17707/02, § 59, ECHR 2004-...). 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 *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, p. 22, § 47; *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 58, ECHR 2005-...).

The Court further observes that neither the first-instance nor the appellate courts took into account the fact that Mr Kern, being a politician, should have shown greater degree of tolerance towards criticism. Accordingly, the Court finds that the domestic authorities failed to take into consideration the crucial importance of free political debate in a democratic society particularly in the context of free elections. Thus, the national authorities cannot be considered as having applied the standards embodied in Article 10 of the Convention and the Court's case-law.

68. Finally, the Court reiterates that the nature and severity of the penalty imposed are also factors to be taken into consideration when assessing the proportionality of the interference (see *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV). In this connection the Court notes that

the applicant was sentenced to a prison term of one year suspended for three years, ordered to pay for the publication of the judgment in one national daily and for the announcement containing her apologies to Mr Kern in the weekly “Angora”. The Government argued that the applicant did not suffer any prejudice since the prison sentence had not been enforced. However, the Court considers that what matters here is not that her sentence was not enforced but that she was convicted at all (see, *mutatis mutandis*, *Lopes Gomes da Silva v. Portugal*, judgment of 28 September 2000, § 36). Furthermore, a decision not to enforce the prison sentence does not expunge her conviction and does not quash the applicant’s criminal record. The Court considers that the circumstances of the instant case - concerning defamation of a politician in the context of a heated political debate - present no justification for the imposition of a prison sentence (see, *Cumpănă and Mazăre v. Romania*, cited above, §§ 115 and 116). The conviction of the applicant for making during her parliamentary campaign press and radio statements alleging abuse of power by one of the most powerful politicians in the country must have had “a chilling effect” on the freedom of expression in public debate in general.

69. Taking into account the above considerations and regard being had to the fact that there is little scope under Article 10 § 2 of the Convention for restrictions on political debate, the Court finds that the domestic courts overstepped the narrow margin of appreciation afforded to member States, and that there was no reasonable relationship of proportionality between the measures applied by them and the legitimate aim pursued.

The authorities therefore failed to strike a fair balance between the relevant interests of, on the one hand, the protection of the politician’s rights and, on the other, the applicant’s right to freedom of expression and the general interest in promoting this freedom where issues of public interest are concerned.

In those circumstances the Court finds that the interference with Mrs Malisiewicz-Gaśior’s exercise of her freedom of expression was not “necessary in a democratic society” within the meaning of paragraph 2 of Article 10 of the Convention.

70. There has therefore been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. 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

72. The applicant did not claim any particular sum in respect of pecuniary and non-pecuniary damage. However, she requested the Court to award her non-pecuniary damage that would compensate her and her family’s suffering.

73. The Government asked the Court to rule that the finding of a violation would constitute in itself sufficient just-satisfaction. In the alternative, they invited the Court to make an award of just satisfaction on the basis of its case-law in similar cases and national economic circumstances.

74. The Court considers that the applicant must have sustained non-pecuniary damage, such as distress and frustration resulting from criminal proceedings and conviction, which is not sufficiently compensated by the finding of a violation of the Convention. Making the assessment on an equitable basis, the Court awards the applicant 5 000 euros (EUR) under this head plus any tax that may be chargeable on that amount.

B. Costs and expenses

75. The applicant, who was unrepresented, did not seek to be reimbursed for any costs or expenses in connection with the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;
2. *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, EUR 5 000 (five thousand euros) in respect of non-pecuniary damage, to be converted into Polish zlotys at the rate applicable at the date of the 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.

Done in English, and notified in writing on 6 April 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President