



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

FOURTH SECTION

CASE OF KWIECIEŃ v. POLAND

(Application no. 51744/99)

JUDGMENT

STRASBOURG

9 January 2007

FINAL

09/04/2007

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

In the case of Kwiecień v. Poland,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr K. TRAJA,

Mr L. GARLICKI,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA, *judges*,

and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having deliberated in private on 5 December 2006,

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

PROCEDURE

1. The case originated in an application (no. 51744/99) 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, Mr Leszek Kwiecień ("the applicant"), on 7 April 1999.

2. The applicant was represented by Ms K. Miszczuk, a lawyer practising in Świdnica. 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 proceedings brought against him under section 72 of the Local Elections Act had infringed his right to freedom of expression under Article 10.

4. On 15 March 2005 the Court declared the application partly inadmissible and decided to communicate the complaints of procedural unfairness and interference with the applicant's right to freedom of expression to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1949 and lives in Dzierżoniów. He used to

run a car repair garage.

6. He was a party to various sets of administrative proceedings before the Dzierżoniów District Office (*Urząd Rejonowy*) relating to planning matters and disputes with his neighbours. He considered that the decisions of the District Office in his cases were incorrect and unlawful as evidenced by the fact that they were regularly quashed by higher administrative authorities. He formed that view, *inter alia*, on the basis of proceedings in which the District Office had, in a decision of 25 March 1996 (no. BA-7355-D/21/10/96), ordered him to demolish a building (a tank) on his property on the ground that it had been erected illegally. Those proceedings, following the applicant's complaints, were discontinued by the District Office on 28 November 1996 in decision no. BA-7355-D/21/24/95-96 in which it held that the building had in fact been erected legally. The applicant also referred to a decision by the District Office of 4 May 1998 refusing him planning permission. On 30 July 1998 the Wałbrzych Governor, reversed that decision following an appeal by the applicant and granted planning permission (decision no. 145/98).

7. The Head of the Dzierżoniów District Office was Mr S.L., who was due to stand for election to the district council (*rada powiatu*) in the local elections scheduled for 11 October 1998. On 21 September 1998 the applicant sent Mr S.L. an open letter calling on him to withdraw from the election. The applicant sent copies of his letter to the Wałbrzych Governor, the Wałbrzych Regional Assembly, the Dzierżoniów Municipal Council, local mayors, the Prime Minister's Office and a number of local newspapers. A thousand copies of the letter were to be made available to local inhabitants. According to the applicant none of the newspapers published the letter.

“Open letter

Mr S.L.
Head of the Dzierżoniów District Office

Dear Sir,

I kindly request that you once again reflect on the suitability of your standing for election to the district council in the local elections of 11 October 1998. My open letter is not motivated by spite, but is merely intended to express my concern that persons who represent me should be willing to help others in solving their problems instead of doing them harm. I consider that as the Head of the Dzierżoniów District Office you carried out your duties ineptly and sometimes even maliciously, frequently breaking the law and basing your statements on lies. In order to demonstrate that my opinion is not groundless I refer to the [following] supporting facts:

[a] in case no. BA-7355-D/27 a crucial document was lost from the case file by the administrative authority you are in charge of. The public prosecutor's office in Dzierżoniów made an inquiry into this matter;

[b] [administrative] decision no. BA-7355-D/27/35/93-96 of 8 March 1996 was issued by the authority you are in charge of on the basis of documents which were forged in the Dzierżoniów District Office;

[c] in order to intimidate me the administrative authority you are in charge of instituted proceedings no. 7355-D/21 which resulted in decision no. BA-7355-D/21/10/96 requiring the demolition of a building. Subsequently by virtue of decision no. BA-7355-D/21/24/95-96 the proceedings were discontinued, after it was found that the building had in fact been erected lawfully;

[d] for a period of eight months you have maliciously and unlawfully refused to grant my application for planning permission. This malicious conduct was brought to an end by the Wałbrzych Regional Governor who decided to grant my application (decision no. 145/98);

[e] while defending your position on the refusal to issue a building permit you resorted to a lie (see the article 'War with decisions' that was published in the *Gazeta Wrocławska* of 30 June 1998);

[f] you instituted enforcement proceedings in violation of my rights. In breach of the law and in excess of your powers you demanded that I perform a non-existent obligation. The enforcement proceedings were discontinued by the Dzierżoniów Tax Office by virtue of decision no. US VIII-924/67/98.

I think that the above few examples should prompt you to consider whether you should withdraw. I have only one question: WOULD YOU LIKE A PERSON WHOM YOU ELECT TO LOCAL GOVERNMENT TO DEAL WITH YOUR CASES AS ILLUSTRATED BY THE ABOVE EXAMPLES?

Yours sincerely

Leszek Kwiecień”

8. On 6 October 1998 Mr S.L. brought an action against the applicant in the Wałbrzych Regional Court (*Sąd Wojewódzki*) under section 72 of the Law on Elections to Municipal Councils, District Councils and Regional Assemblies (“the Local Elections Act”). He sought an order requiring the applicant to correct untrue information that had been circulated in the open letter and to publish a correction in the local newspapers *Gazeta Wrocławska* and *Tygodnik Dzierżoniowski* and other newspapers to which the open letter had been originally addressed. Mr S.L. also requested that the court order the applicant to issue an apology. Finally, he requested that the applicant be ordered to pay PLN 10,000 for the benefit of a charity run by the Order of St. Elizabeth in Dzierżoniów and to pay PLN 10,000 to the claimant in damages.

9. On 7 October 1998 (at about 2 p.m.) the Wałbrzych Regional Court gave its decision. It ordered the applicant to publish in the local newspaper *Gazeta Wrocławska* and in a letter to the claimant a statement that he had included untrue information in his open letter of 21 September 1998 and the following apology:

"I apologise to Mr. S.L. for defamatory statements about him which were included in my open letter to him of 21 September 1998".

The court also ordered the applicant to pay PLN 10,000 for the benefit of the charity run by the Order of St. Elisabeth in Dzierżoniów and PLN 10,000 to the claimant in damages.

10. The Regional Court held as follows:

"The court established the following facts:

The defendant sent to the claimant and a large number of persons and institutions his open letter dated 21 September 1998, in which he alleged that the claimant, while the Head of the Dzierżoniów District Office, had been an inept, and sometimes malicious manager and had frequently broken the law. He alleged that a document had been lost from a case file examined by the District Office, that in another case documents had been forged, and that the claimant, with a view to intimidating the defendant, had instituted proceedings and ordered him to demolish a building; [that] for 8 months he had maliciously refused to grant planning permission, [that] he had resorted to a lie in the 30 June 1998 edition of '*Gazeta Wroclawska*', and, finally, that he had instituted enforcement proceedings, infringing the defendant's rights, and thus broken the law and abused his authority by demanding that the defendant execute a non-existent obligation (see the defendant's open letter of 21 September 1998).

On 29 June 1995 the Dzierżoniów District Prosecutor's Office discontinued the investigation in case no. Ds 936/95 concerning a lost document since no suspects could be identified. It did not determine when or where a copy of the decision of the Dzierżoniów Municipal Council dated 12 October 1973 had been lost (copy of the decision to discontinue the proceedings of 29 June 1965). ...

On 21 November 1995 the Dzierżoniów District Office instituted proceedings of its own motion in respect of the construction of a tank on the defendant's property, following complaints from neighbours. Those proceedings were discontinued by a decision of 28 November 1996, since it was established in the course of the proceedings that the tank had been constructed legally (... decision of the Dzierżoniów District Office of 25 March 1996, decision of the Dzierżoniów District Office of 28 November 1996).

On 5 November 1997 the defendant and his wife made an application to the Dzierżoniów District Office for planning permission in respect of a shop/office, a manual car wash, a tank, These administrative proceedings were terminated by the Wałbrzych Governor's decision of 30 July 1998

On 30 June 1998 '*Gazeta Wroclawska*' published an article 'War with decisions', in which the claimant mentioned a sewer junction located at the intersection of Wojska Polskiego Street and Staszica Street in Dzierżoniów. In the defendant's letter published in '*Gazeta Wroclawska*' of 10 July 1998 he stated that there was no sewer junction in the place indicated by the claimant.

By a decision of 11 December 1997 the Dzierżoniów District Office ordered the defendant and his wife to produce the documents necessary to obtain permission to use a building. On 10 March 1998 the Dzierżoniów District Office executed the order of 11 December 1997 in lieu of the debtors and at the debtors' expense. On 6 July 1998 the Dzierżoniów Tax Office discontinued the enforcement proceedings ...

The court considered:

The content of the open letter dated 21 September 1998 from the defendant to the claimant, which was received by a large number of people and institutions, constitutes a ground for allowing the application under section 72 of the Local Elections Act. That letter contains untrue information about the claimant and the authority of which he is the head. The [court's] assessment of the evidence showed that it was not true that a document had been lost from the case file in one of the cases examined by the Dzierżoniów District Office, that documents had been forged, or that the District Office had sought to intimidate the defendant or had acted maliciously against him. Nor is it true that the claimant violated the defendant's rights by instituting enforcement proceedings, in the course of which he broke the law and abused his authority. The investigation carried out in respect of the [lost] document did not establish the time or place of its disappearance. The defendant did not prove that the maps prepared by the District Office were forgeries or that the District Office had acted improperly, still less, maliciously. These are the defendant's impressions which are arbitrary and unsupported by evidence. All of the proceedings which were pending before the Dzierżoniów District Office were instituted and carried out on the basis of applicable law and the defendant exercised his right to appeal against individual decisions. It was established that the proceedings were conducted speedily, as evidenced by the dates on which they were instituted and on which they ended. As regards the claimant's statement in '*Gazeta Wrocławska*' the court found credible his claims that the statement had not been approved beforehand and so might be inaccurate and that the claimant could not speak about a sewer which had existed in the place he had indicated.

In these circumstances, the court finds the application founded and, pursuant to section 72 subsections 1, 3, 4, 5 and 6 of the Local Elections Act, rules as in the operative part"

11. On 8 October 1998 the applicant complained to the President of the Wałbrzych Regional Court that he had been refused access to the official record of the hearing of 7 October 1998. He also alleged that he had been refused access to the case file, despite the fact that the claimant had adduced new documentary evidence with a view to rebutting the truthfulness of the applicant's statements. He argued that this refusal had had adversely affected his rights as a party to the proceedings, in view in particular of the 24-hour time-limit for filing an appeal.

12. At about midday on 8 October 1998 the Regional Court allowed the applicant access to the case file.

13. On 8 October 1998 the applicant filed an appeal with the Wrocław Court of Appeal (*Sąd Apelacyjny*) and requested that the decision of the Regional Court be quashed.

14. He submitted that his open letter did not amount to electoral campaigning. He relied, *inter alia*, on Article 10 of the Convention and submitted that his critical remarks concerned Mr S.L. as the head of an administrative authority. The criticism was based on shortcomings in the administrative proceedings in which the applicant was involved, as evidenced by numerous documents, relevant administrative decisions and

statements of higher administrative authorities and of the Supreme Administrative Court. Furthermore, the applicant contested the Regional Court's finding that the information contained in the open letter was untrue. He submitted that the first-instance court had not examined the circumstances of the case and had not assessed the evidence before it thoroughly. Further, he submitted that at the hearing the Regional Court had prevented the applicant from making comprehensive submissions in reply to the claimant's lengthy arguments and refused to admit evidence confirming the truthfulness of the statements contained in the open letter.

15. The applicant disputed the Regional Court's order to pay damages to S.L. and argued that the claimant had not proved that he had suffered any damage. In respect of the order to make payment to the institution run by the Order of St. Elisabeth, he denied that it was a charity. The applicant complained that the Regional Court had allowed the claimant's application in its entirety and made orders to pay damages and to make payment to a charity at the maximum end of the scale provided for by law. Further, the applicant referred to the fact that after the hearing before the Regional Court his access to the case file had been impeded, despite the fact that an appeal had to be lodged within 24 hours after the first-instance decision was pronounced. Finally the applicant made detailed submissions with a view to proving the accuracy of the factual statements contained in the open letter.

16. The local elections took place on 11 October 1998. Mr S.L. was not elected.

17. On 12 October 1998 the Wrocław Court of Appeal dismissed the applicant's appeal. It also made an order for costs against the applicant for PLN 1,500. The Court of Appeal held as follows:

“The appeal is unfounded.

The proceedings provided for under section 72 of the Local Elections Act are aimed at protecting electoral law and ensuring the proper conduct of the electoral campaign by preventing infringements of the personal rights of those standing for election ..., which could affect the result of the elections.

The Regional Court correctly found that the defendant had clearly infringed the personal rights of the claimant as a candidate for local government office by his open letter to the claimant that was sent to various authorities and individuals.

The content of the letter portrayed the claimant in an unambiguously negative light as a candidate for the local council and was aimed at preventing him from being elected. Contrary to the appellant's assertions, in order to achieve that aim it was not necessary to openly discourage [the voters] from voting for a particular candidate. It was enough that a recipient of information about a candidate should come to such a conclusion, which, given the open letter's content, was very likely.

The court concurs with the Regional Court's findings that the defendant did not prove that his allegations against the claimant were true and so justified his criticism. In fact, the allegations related to decisions issued by the District Office and should not

have been equated with the claimant as such. A legal right of appeal lay against the decisions [and] in most instances the defendant obtained favourable rulings.

Against the background of those decisions, the applicant's categorically negative assessment of the District Office and the attribution of responsibility to the claimant as a person managing the Office, coupled with the fact that this was made public were unwarranted and unjustified in law. The facts of the case appear to indicate unequivocally that the defendant transferred to the claimant an aversion to the District Office he had developed because of dissatisfaction with one of its decisions; he had used this for the purposes of electoral propaganda, and this [situation] was rightly considered by the Regional Court as amounting to a breach of section 72 of the Local Elections Act “

18. On 20 October 1998 the applicant requested a stay of execution of the decision in his case. He submitted that the financial orders made against him, amounting to PLN 20,000, were disproportionate to his earnings and financial situation. On 27 October 1998 the Wrocław Court of Appeal dismissed his request.

19. On 4 December 1998 the applicant filed a cassation appeal against the judgment of the Court of Appeal. On 15 December 1998 the Wrocław Court of Appeal refused to proceed with the cassation appeal, finding that it was inadmissible in law. It observed that section 72 § 3 of the Local Elections Act did not provide for any further appeal against the decision of the Court of Appeal. On 5 January 1999 the applicant appealed against that decision to the Supreme Court. On 3 March 1999 the Supreme Court dismissed the applicant's appeal on the same grounds as those relied on by the Court of Appeal.

20. On an unspecified later date in 1999 the applicant requested the Wrocław Court of Appeal to reopen the proceedings. He submitted that the claimant had not been properly represented in the proceedings before the Court of Appeal. On 20 September 1999 the Court of Appeal rejected the applicant's request. The applicant appealed unsuccessfully. On 31 July 2000 the applicant again requested the reopening of the proceedings. On 8 November 2000 the Świdnica Regional Court (formerly: Wałbrzych Regional Court) rejected his request.

21. On 12 February 2001 the applicant filed a constitutional complaint with the Constitutional Court (*Trybunał Konstytucyjny*). He alleged that section 72 of the Local Elections Act was incompatible with Articles 32, 45 § 1 and 77 § 2 of the Constitution. On 13 May 2002 the Constitutional Court gave judgment. It ruled that section 72 § 3 of the impugned Act, which was construed as excluding any possibility of having the proceedings reopened, was incompatible with Articles 45 § 1 and 77 § 2 of the Constitution.

22. On 20 May 2002 the applicant requested the Wrocław Court of Appeal to direct the reopening of the proceedings in his case, following the judgment of the Constitutional Court. Later, he submitted three further similar requests. On 17 June 2002 the Court of Appeal rejected his request.

The applicant appealed unsuccessfully. On 28 October 2002 the Court of Appeal rejected two of the applicant's further requests for the proceedings to be reopened. In respect of the third request, the Court of Appeal considered that it should be examined by the Świdnica Regional Court. On 16 December 2002 the Świdnica Regional Court rejected the applicant's third request also. All the applicant's appeals were unsuccessful.

23. Having unsuccessfully attempted to reopen the proceedings, on 12 October 2003 the applicant requested the Constitutional Court to provide an interpretation of its judgment of 13 May 2002. On 14 April 2004 the Constitutional Court gave its decision. It ruled that in accordance with Article 190 § 4 of the Constitution its judgment of 13 May 2002 it was possible for proceedings to be reopened after they had been terminated by a decision (*postanowienie*) given on the basis of a provision which had been declared unconstitutional.

24. On 1 February 1999 the enforcement proceedings against the applicant were instituted in respect of the order requiring him to pay PLN 10,000 for non-pecuniary damage to Mr S.L. They were finally terminated on 10 April 2003 since the applicant had executed the order.

25. In the 2002 local elections the applicant was elected a local councillor for the Dzierżoniów Municipal Council.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant constitutional provisions

26. Article 14 provides as follows:

“The Republic of Poland shall ensure freedom of the press and other means of social communication.”

Article 31 § 3 of the Constitution, which lays down a general prohibition on disproportionate limitations on constitutional rights and freedoms (the principle of proportionality), provides:

“Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic State for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.”

Article 54 § 1 of the Constitution guarantees freedom of expression. It states, in so far as relevant:

“Everyone shall be guaranteed freedom to express opinions and to acquire and to disseminate information.”

B. The Local Elections Act

27. Section 72 of the Law of 16 July 1998 on Elections to Municipal Councils, District Councils and Regional Assemblies (*Ordynacja wyborcza do rad gmin, rad powiatów i sejmików województw*) (“the Local Elections Act”) provided, in so far as relevant:

“§ 1. If posters, slogans, leaflets, statements or other forms of publicity or campaign materials contain untrue data or information, candidates standing for local election or representatives of electoral committees shall be entitled to apply to the Regional Court for an order:

- (1) for the confiscation of such materials;
- (2) restraining [the defendant] from publishing such data or information;
- (3) for the correction of the information;
- (4) requiring [the defendant] to apologise to the aggrieved party;
- (5) requiring [the defendant] to pay up to PLN 10,000 to a charity;
- (6) requiring [the defendant] to pay to the claimant up to PLN 10,000 in damages.

§ 2. The Regional Court, sitting with a single judge, shall examine the application referred to in § 1 within 24 hours in non-contentious [civil] proceedings. [...]. The court shall, without undue delay, serve on the interested party referred to in § 1, the regional electoral commissioner and the person required to execute the court's decision a decision which will bring the proceedings in the case to an end.

§ 3. An appeal to the Court of Appeal shall lie against the decision of the Regional Court provided it is lodged within 24 hours from the moment the decision was delivered. The Court of Appeal, sitting as a panel of three judges, shall examine the appeal in non-contentious [civil] proceedings, under the same procedure and within the time-limit referred to in § 2. No appeal shall lie against the decision of the Court of Appeal and its decision shall be enforceable with immediate effect.

28. On 3 July 2002 a bill amending the Local Elections Act was tabled in the *Sejm*. Under the terms of the bill, subsections 5 and 6 of section 72 of the Local Elections Act were to be repealed with a view to aligning that Act with the Law of 12 April 2001 on Elections to the *Sejm* and the Senate of the Republic of Poland (*Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej i do Senatu Rzeczypospolitej Polskiej*). On 26 July 2002 the *Sejm* amended section 72 of the Local Elections Act by repealing subsection 6. However, subsection 5 of section 72 of the Local Elections Act remained unchanged.

C. Parliamentary elections

29. Until 31 May 2001 the conduct of parliamentary elections was primarily governed by the Law of 28 May 1993 on Elections to the *Sejm* of the Republic of Poland (*Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej*). Section 139 of the Law of 28 May 1993 provided for comparable summary proceedings to those referred to in section 72 of the Local Elections Act. However, that provision laid down a substantially lower ceiling (PLN 2,000) on the amount which a defendant could be ordered to pay to a charity or for non-pecuniary damage. The Law of 12 April 2001 on Elections to the *Sejm* and the Senate of the Republic of Poland (*Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej i do Senatu Rzeczypospolitej Polskiej*), which entered into force on 31 May 2001, repealed the Law of 28 May 1993. Section 91 of the latter Law, which regulates summary electoral proceedings, does not provide for any pecuniary awards to be granted against a defendant.

D. Case-law of the Polish courts

30. On 1 October 1998 the Katowice Court of Appeal gave a decision in case no. I ACz 972/98 in which it stated:

“1. Section 72 of the Local Elections Act applies to factual statements contained in the materials pertaining to an electoral campaign. It does not apply to conclusions or opinions based on those factual statements. Only factual statements have an objective character. Every opinion is subjective depending on the viewpoint of the person holding it.

2. No one can be prevented from expressing his views and making comments as long as he or she does not infringe the rights of others. However, even an infringement of personal rights that fails to meet the conditions specified in section 72 will not qualify the holder of the right for protection under that provision, since it is an exception [to the general rule] and thus cannot be interpreted broadly.”

31. On 7 November 2002 the Katowice Court of Appeal gave a decision in case no. I ACz 1956/02 in which it held:

“Section 72 of the Local Elections Act [...] provides an exception to the general rule and so cannot be construed broadly. It is applicable solely to untrue information included in electoral materials. It is not applicable to comments and opinions concerning the characteristics of a candidate [for election]. If such comments and opinions infringe the candidate's personal rights, he may seek redress under the general rules [of protection of personal rights], but not on the basis of section 72 of the Local Elections Act.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. The applicant complained that the decisions in the proceedings that had been brought against him under section 72 of the Local Elections Act had infringed his right to freedom of expression. He relied on Article 10 of the Convention, the relevant part of which provides:

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

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

33. The Government submitted that the applicant had not exhausted domestic remedies as he had failed to avail himself of the possibility to re-open the proceedings following the Constitutional Court's interpretative decision of 14 April 2004. They argued that since the applicant had based his claims mainly on decisions that had been issued after the final decision in the substantive proceedings had been taken, he should have requested the re-opening of the proceedings as the Constitutional Court had stated in its decision of 14 April 2004. In that decision the Constitutional Court held that the applicant could have applied for retrospective leave to lodge his request for the re-opening of the proceedings that had been terminated by the Świdnica Regional Court's decision of 8 November 2000. The Constitutional Court stated that its judgment of 13 May 2002 provided a ground for such a request.

34. The applicant disagreed and maintained that he had exhausted all relevant remedies. He argued that the Government had not substantiated their assertion that other effective remedies existed. In respect of the remedies indicated in the Constitutional Court's decision of 14 April 2004, the Government had failed to specify what those remedies were or their statutory basis. The applicant pointed out that the aforementioned ruling had

been an interpretative decision which he had sought in view of the ordinary courts' refusal to re-open the substantive proceedings following the Constitutional Court's judgment of 13 May 2002. He further submitted that he had not been required to seek interpretation of the Constitutional Court's judgment and, *a fortiori*, that it was not a remedy which would normally have to be exhausted. Even if, as indicated in the decision of 14 April 2004, the applicant had been under an obligation to file a request for the proceedings to be re-opened – itself an extraordinary remedy – he had done so. Following the Constitutional Court's judgment of 13 May 2002, he had filed three such requests on 1 and 30 June 2002 and 3 July 2002. All requests had been rejected by the Wrocław Court of Appeal on 28 October 2002 and the Świdnica Regional Court on 16 December 2002. Thus, the applicant argued that he had exhausted all necessary domestic remedies.

35. The Court first observes that the applicant challenged the constitutionality of section 72 § 3 of the Local Elections Act in so far as it excluded the possibility of having the proceedings re-opened. In its judgment of 13 May 2002 the Constitutional Court found for the applicant. The Court further notes that following the Constitutional Court's judgment, the applicant unsuccessfully attempted to have the substantive proceedings re-opened. Subsequently, the applicant requested the Constitutional Court to provide an interpretation of its judgment of 13 May 2002. In the decision given on 14 April 2004 the Constitutional Court held that the applicant could have applied to have the proceedings that had been terminated by the decision of the Świdnica Regional Court of 8 November 2000 re-opened on the basis of the judgment of 13 May 2002. It appears that the applicant did not attempt to re-open the proceedings referred to in the decision of the Constitutional Court.

However, the Court observes that, following the Constitutional Court's judgment of 13 May 2002, the applicant was only required to request the re-opening of the substantive proceedings, which he did, albeit unsuccessfully. The Court considers that the applicant cannot be required to exhaust any further remedies. For these reasons, the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

36. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. The parties' submissions on the merits

1. The applicant

37. The applicant argued that the violation of his right to freedom of

expression could not be justified under Article 10 § 2 of the Convention. He maintained that the statements in his open letter were true and supported by the facts, contrary to the domestic courts' findings. In addition, their truthfulness was confirmed by the decisions of the Supreme Administrative Court subsequent to the judgments of the Regional Court and the Court of Appeal. Had the courts correctly assessed the evidence adduced by the applicant, they would have established the accuracy of his statements. The applicant further submitted that the limitation on his freedom of expression could not have as its aim the protection of Mr S.L.'s unlawful actions.

2. The Government

38. The Government admitted that the domestic courts' decisions had amounted to an interference with the applicant's right to freedom of expression. They said that the interference was prescribed by the provisions of the Local Elections Act and was aimed at protecting the rights of S.L.

39. The Government agreed that S.L. had been a local politician whose activity could properly be the subject of criticism or, at least, close scrutiny by the local community. However, they also submitted that the relationship between a local politician and his or her community was much closer than comparable relationships at the national level. In small communities people based their choice of representative on personal relations with the candidates and on the candidate's reputations in the community. Thus, allegations against a politician had different, more far reaching, effects in a local community than at the national level. The Government maintained that the allegations made by the applicant had sought to lower Mr S.L. in the public esteem and divest him of the necessary public trust and had caused irreparable damage. Those allegations had to be assessed in the light of their possible consequences.

40. The Government argued that the applicant's statements in his open letter, such as the assertion that Mr S.L. had acted in breach of the law or had based his decisions on forged documents, were pure statements of fact. In their view, the range of legitimate criticism could not include allegations of breaking the law; consequently, the interference had been necessary in order to protect the rights of others. The applicant's statements had been defamatory and amounted to an allegation of abuse of public authority. Such statements did not constitute a contribution to the formation of public opinion that was worth safeguarding in a democratic society. As regards the proportionality of the interference, the Government submitted that the applicant's case had not been decided on the basis of the criminal law.

C. The Court's assessment

41. It was not disputed that the court decisions against the applicant and the sanctions imposed on him following the dissemination of his open letter

amounted to “interference” with his right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. The interference was undoubtedly prescribed by law, namely section 72 of the Local Elections Act. The Court further accepts that the interference pursued the legitimate aim of protecting the reputation or rights of others – Mr S.L. in this instance, within the meaning of Article 10 § 2 of the Convention.

42. Accordingly, the only outstanding issue is whether the interference with the applicant's right to freedom of expression was “necessary in a democratic society”.

1. The general principles

43. According to the Court's case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, 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, *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I; and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

44. 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, ECHR 2004-XI).

45. 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 (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). 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 comments held against the applicant and the context in

which he made them (see *News Verlags GmbH & Co. KG v. Austria*, no. 31457/96, § 52, ECHR 2000-I).

46. 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 measures taken were “proportionate to the legitimate aims pursued” (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). 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 (see, among many other authorities, *Zana v. Turkey*, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, pp. 2547-48, § 51). In addition, the fairness of the proceedings, the procedural guarantees afforded (see, *mutatis mutandis*, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 95, ECHR 2005-...) and the nature and severity of the penalties imposed (see *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV; and *Skalka v. Poland*, cited above, §§ 41-42) are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 171, ECHR 2005-...).

47. The Court further recalls that 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; and *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1567, § 54).

48. Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system (see *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, p. 22, § 47). The two rights are inter-related and operate to reinforce each other. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely (see, *Bowman v. the United Kingdom*, judgment of 19 February 1998, *Reports* 1998-I, § 42). This principle applies equally to national and local elections.

2. Application of the principles

49. In exercising its supervisory jurisdiction the Court must look at the impugned interference with the applicant's right to freedom of expression in the light of the case as a whole, including the content of the statements

concerned, the context in which they were made and also the particular circumstances of those involved.

50. In the instant case, the applicant, during the period directly preceding the local elections, circulated an open letter in which he alleged that Mr S.L. as the Head of the District Office, had carried out his duties ineptly and broken the law, and called on him to withdraw from standing for election., As he had been a party to numerous administrative proceedings before the District Office in which decisions issued by that office were subsequently quashed on appeal, the applicant formed the view that Mr S.L. had acted in bad faith and against his interests. Subsequently, Mr S.L. issued summary proceedings against the applicant under the Local Elections Act, alleging that the statements included in the applicant's open letter were untrue and aimed at damaging his reputation. The domestic courts found against the applicant and held that the impugned statements regarding Mr S.L. were untrue. The Court of Appeal further held that the applicant had infringed Mr S.L.'s personal rights and had tried to prevent him from being elected. The applicant was ordered to correct the untrue information and issue an apology. He was also ordered to pay PLN 10,000 to Mr S.L. for non-pecuniary damages and PLN 10,000 to a charity.

51. The Court observes that the general aim of the applicant's open letter was to attract the voters' attention to the suitability of Mr S.L. as a candidate for local public office. It accordingly finds that the statements in the letter concerned a matter of public interest for the local community, even if some of them might appear harsh or far-fetched. As a general rule, the Court considers that opinions and information pertinent to elections, both local and national, which are disseminated during the electoral campaign should be considered as forming part of a debate on questions of public interest, unless proof to the contrary is offered. The Court reiterates that in respect of matters of public interest restrictions on freedom of expression should be interpreted narrowly (*Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 33, ECHR 2000-X).

52. As regards the reasons cited by the domestic courts to justify the interference with the applicant's right to freedom of expression, the Court first notes that the Polish courts, despite the applicant's reliance on Article 10 of the Convention in the appellate proceedings, failed to recognise that the present case involved a conflict between the right to freedom of expression and the protection of the reputation and the rights of others and so did not carry out the relevant balancing exercise (see, *mutatis mutandis*, *Keller v. Hungary* (dec.), no. 33352/02, 4 April 2006). Nor did they give any consideration to the fact that the limits of acceptable criticism of Mr S.L. as the head of the local administrative authority were wider than in relation to a private individual. The Court notes that by taking a decision to stand for local election Mr S.L., who up to that point had been the head of an administrative authority, entered the political arena and thus had to

accept close scrutiny of his words and deeds and display a greater degree of tolerance (see, *Jerusalem v. Austria*, no. 26958/95, § 38, ECHR 2001-II). Indeed, the Court notes that the Government accepted that Mr S.L. was a local politician. Nevertheless, the domestic courts failed to take these factors into account when deciding Mr S.L.'s application under the Local Elections Act.

53. Secondly, the Court notes that in its practice it has distinguished between statements of fact and value judgements. While the existence of facts can be demonstrated, the truth of value judgements is not susceptible of proof. Where a statement amounts to a value judgement, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgement without any factual basis to support it may be excessive (see *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, p. 236, § 47; and *Feldek v. Slovakia*, no. 29032/95, § 76, ECHR 2001-VIII).

54. As regards the categorisation of the applicant's statements, the Court observes that the Polish courts unreservedly qualified all of them as statements of fact without a factual basis. It is prepared to accept that some of the statements, such as the assertion that the claimant "frequently broke the law" could be considered as statements of fact which lacked a sufficient factual basis. However, the Court observes that the thrust of the applicant's open letter was to cast doubt on the claimant's suitability for local public office, based on the applicant's long experience of dealing with the District Office of which Mr S.L. was the head. It considers, contrary to the view taken by the domestic courts, that the applicant's open letter also included statements which could reasonably be regarded as value judgements, such as the statement that the claimant "carried out his duties ineptly". In paragraph (c) and (d) of the open letter the applicant provided specific examples of decisions issued by the District Office which were subsequently quashed on appeal. In this respect, the Court also notes that the Court of Appeal's judgment of 12 October 1998 expressly confirmed that most of the decisions referred to in the open letter had been successfully appealed against by the applicant. Thus, the Court finds that the applicant's allegations that Mr S.L. did not run the District Office competently were not devoid of a factual basis. In this respect the Court reiterates that, in a democratic society, public authorities and their representatives expose themselves in principle to the permanent scrutiny of citizens and that everyone must be able to draw public attention to situations that they consider unlawful provided that they do so in good faith (*Vides Aizsardzības Klubs v. Latvia*, no. 57829/00, § 46 *in fine*, 27 May 2004). In the circumstances of the present case, it cannot be said that the applicant acted in bad faith. Having regard to the above, the Court considers that the applicant's statements were not a gratuitous personal attack on Mr S.L., but

part of a debate on matters of public interest.

55. Furthermore, the Court observes that the specific feature of the present case was the summary nature of the proceedings that were brought against the applicant under the Local Elections Act. Proceedings of this type are conducted within very short time-limits. As pointed out by the Wrocław Court of Appeal, they are aimed at ensuring the proper conduct of the electoral campaign by preventing infringements of the candidates' personal rights, which are capable of affecting the result of the elections. The Court considers that the provision of such a summary remedy during periods of (local and national) electoral campaigns serves the legitimate goal of ensuring the fairness of the electoral process and as such can not be questioned from the Convention standpoint. At the same time, as desirable as the expeditious examination of election-related disputes may be, it should not result in the undue curtailment of the procedural guarantees afforded to the parties to such proceedings, in particular the defendants. In this respect, the Court notes that in the proceedings under consideration the applicant relied heavily on the fact that the Dzierżoniów District Office had given a number of unfavourable decisions against him which had subsequently been quashed on appeal. These circumstances, which were properly documented by the applicant in the proceedings, formed the basis for his critical comments concerning Mr S.L. as the person in charge of the District Office. However, the Court notes that neither the Regional Court nor the Court of Appeal appears to have sufficiently examined the evidence adduced by the applicant which, at least to some extent, could be considered as justifying his critical remarks about S.L. On that account, the fairness of the proceedings may be called into question. The Court also notes that the Court of Appeal's judgment was given on 12 October 1998, one day after the local elections had taken place, by which time the proceedings had lost all relevance to the claimant's electoral prospects. By the same token, the Court of Appeal failed to comply with the statutory requirement to deliver judgment within 24 hours from the moment the appeal is lodged. The Court notes that in these circumstances the Court of Appeal could have discontinued the proceedings, having regard, in particular, to the fact that the aggrieved party had the right to issue ordinary civil proceedings against the applicant for the protection of his personal rights.

56. The nature and severity of the sanction imposed are also factors to be taken into account when assessing the proportionality of the interference under Article 10 of the Convention. Under the Convention, an award of damages for defamation, or similar remedies such as those granted in the present case, must bear a reasonable relationship of proportionality to the injury to reputation suffered (*Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, § 49). In the instant case the applicant was ordered to arrange for the publication of a correction in the press, and to pay PLN 10,000 (approximately EUR 2,500) to the claimant

for non-pecuniary damage and PLN 10,000 to a charity. The Court notes that both awards were the maximum amounts which could be imposed under the Local Elections Act, as worded at the relevant time. The combined total came to more than sixteen times the average monthly wage at the material time. The Court observes that on 26 July 2002 Parliament amended section 72 of the Local Elections Act by repealing the provision which allowed the claimant to seek an award of damages from the defendant. In addition, the Court notes that, when imposing the pecuniary sanctions on the applicant, the domestic courts failed to provide any reasons to justify the imposition of the maximum pecuniary sanctions on the applicant or, therefore, to carry out any assessment of proportionality. In these circumstances, the Court finds that the pecuniary sanctions imposed on the applicant were excessive (see *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, no. 55120/00, § 132, ECHR 2005-... (extracts)).

57. Having regard to the foregoing, the Court considers that the domestic courts' finding against the applicant and the sanctions imposed were disproportionate to the legitimate aim pursued, and that the reasons given by the domestic courts to justify those measures were not "relevant and sufficient". Accordingly, the interference complained of was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

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

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

59. The applicant also complained under Article 6 § 1 of the Convention that his right to a fair hearing had not been respected in the proceedings brought under section 72 of the Local Elections Act, in that the statutory time-limits applicable to those proceedings were unreasonable and had adversely affected his ability to present his case. He further submitted that the courts had not examined the link between his statements and the official decisions he had relied on in support thereof. He also alleged that he had unfairly been denied access to the case file. Article 6 § 1 provides, in so far as relevant:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by [a] tribunal ..."

60. The Government contested the applicant's allegation that the proceedings had been unfair. They further argued that the applicant had not exhausted domestic remedies, as he had failed to lodge a constitutional complaint. The applicant disagreed with the Government's submissions.

61. The Court notes that this complaint is linked to the complaint

examined above and must, therefore, likewise be declared admissible.

62. Having regard to its findings relating to Article 10 of the Convention (see paragraphs 57 and 58 above), the Court does not find it necessary to examine whether, in this case, there has been a violation of Article 6 § 1 (see, among other authorities, *Jerusalem v. Austria*, cited above, § 51).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. 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

64. The applicant claimed 32,019 Polish zlotys (PLN) in respect of pecuniary damage for the alleged breaches of Articles 6 § 1 and 10 of the Convention. That overall amount corresponded to the value of two awards made against the applicant (PLN 20,000), the court fees the applicant was ordered to pay by the Court of Appeal (PLN 1,500), and the fees and costs imposed in the enforcement proceedings in respect of the award for non-pecuniary damage made in favour of Mr S.L. (PLN 4,019). Furthermore, the applicant claimed the reimbursement of the legal fees he had incurred in the proceedings before the Regional Court and the Court of Appeal (PLN 1,000), the Constitutional Court (PLN 1,000) and in the Strasbourg proceedings (PLN 4,500).

65. The Government did not comment.

66. The Court observes that the applicant suffered pecuniary damage in that he was ordered to pay PLN 10,000 for non-pecuniary damage to Mr S.L. and PLN 10,000 to a charity, and to pay PLN 1,500 in court fees for the proceedings before the Court of Appeal. It therefore awards the applicant EUR 5,600, being the combined level of all the above amounts, having regard to the direct link between the above claims and the violation of Article 10 found by the Court (see *Hrico v. Slovakia*, no. 49418/99, § 55, 20 July 2004). Conversely, the Court finds no such direct link between the violation found and the fees and costs incurred by the applicant in the enforcement proceedings. As regards the claims related to legal representation in the domestic and Strasbourg proceedings, they fall to be addressed under the head of “Costs and expenses” below.

B. Non-pecuniary damage

67. The applicant claimed an overall amount of PLN 38,000 in respect of non-pecuniary damage related to breaches of Articles 6 § 1 and 10 of the Convention. He argued that the various sanctions imposed on him by the domestic courts had damaged his personal and business reputations. The applicant further alleged that he had suffered family and health problems as a result of the enormous financial burden caused by the financial penalties that had been imposed on him in the proceedings. Furthermore, as a result of losing his clients' trust in him, the applicant said that he had been forced to cease his business activities and had become unemployed with no right to unemployment benefit. In addition, Mr S.L. had instituted enforcement proceedings which had generated additional costs for the applicant, despite the fact that he had intended to pay the amount due but had been unable to do so because his letter to S.L. requesting his bank details had remained unanswered. Lastly, the applicant argued that the non-pecuniary damage he had suffered related to his loss of confidence in the administration of justice and the rule of law.

68. The Government submitted that a finding of a violation would constitute sufficient just satisfaction. In the alternative, they invited the Court to assess the amount of just satisfaction on the basis of its case-law in similar cases and having regard to the national economic circumstances.

69. The Court considers that the applicant sustained damage as a result of the breach of Article 10. Having regard to the nature of the violation found in the present case and deciding on an equitable basis, the Court awards the applicant EUR 2,000 in compensation for non-pecuniary damage.

C. Costs and expenses

70. The applicant claimed PLN 1,000 for his legal representation in the proceedings before the Regional Court and the Court of Appeal, PLN 1,000 for the proceedings before the Constitutional Court and PLN 4,500 for costs and expenses incurred before the Court.

71. The Government submitted that the costs and expenses should be granted only in respect of the Strasbourg proceedings and in so far as they had been actually incurred and were reasonable as to quantum.

72. Under the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court grants the applicant EUR 250 in respect of his costs and expenses incurred in the proceedings before the Regional Court

and the Court of Appeal. It does not, however, find any justification for awarding his costs incurred in the proceedings before the Constitutional Court as they were not directly related to the issues decided by the Court.

As regards the Strasbourg proceedings, the Court notes that the applicant was paid EUR 715 in legal aid by the Council of Europe. Having regard to all relevant factors, it considers it reasonable to award an additional sum of EUR 800 for the proceedings before the Court.

D. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the remainder of the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds* that there is no need to examine the complaint under Article 6 § 1 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,600 (five thousand six hundred euros) in respect of pecuniary damage, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage and EUR 1,050 (one thousand and fifty euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

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

Françoise ELEN-PASSOS
Deputy Registrar

Nicolas BRATZA
President