



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

FOURTH SECTION

DECISION

Application no. 29686/10
Zbigniew ZIOBRO
against Poland

The European Court of Human Rights (Fourth Section), sitting on 16 December 2014 as a Committee composed of:

Ledi Bianku, *President*,

Paul Mahoney,

Krzysztof Wojtyczek, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having regard to the above application lodged on 26 May 2010,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Zbigniew Ziobro, is a Polish national, who was born in 1970 and lives in Kraków. The applicant is a former Minister of Justice – Prosecutor General and a former Member of the European Parliament. Currently, he is a leader of the political party *Solidarna Polska*. The facts of the case, as submitted by the applicant, may be summarised as follows.

2. On 14 February 2007 the applicant, then the Minister of Justice – Prosecutor General together with the Head of the Central Anti-corruption Bureau (CAB) hosted a press conference regarding an arrest and investigation against one of the most recognised Polish cardio surgeons referred to as “Doctor G.”. During that conference the applicant spoke about the investigation and charges against M.G. and stated that the preliminary assessment of the case showed that M.G. had likely committed a homicide. During the press conference the applicant explicitly stated: “no-one else will ever again be deprived of life by this man” (see for details: *Miroslaw Garlicki v. Poland*, no. 36921/07, §§ 33-40, 14 June 2011).

3. On 28 August 2007 M.G. brought a civil action against the applicant for infringement of his personal rights under Articles 24 and 448 of the Civil Code, seeking just satisfaction and public apology as well as an order enjoining the defendant to refrain from making any future statements which would suggest that the applicant had committed homicide (*ibid.*, §§ 41 - 56).

4. On 20 February 2008 the applicant applied for disqualification of a judge hearing the case (Judge Z.D.). He submitted that W.S., a party to a civil case heard by Judge Z.D., being dissatisfied with its outcome, filed a criminal complaint against the judge, alleging that he had abused his powers. The investigation into this matter was discontinued by a decision of the Kraków District Prosecutor. Subsequently, W.S. filed a complaint against the decision to discontinue the investigation with the Office of the Prosecutor General. The applicant, in his capacity of Prosecutor General and exercising his supervisory powers, referred W.S.'s complaint to the Kraków Appellate Prosecutor's Office for further examination. According to the applicant, the fact in itself established a link between him and Judge Z.D. which justified the disqualification. Further, the applicant claimed that the alleged lack of impartiality had been clearly visible due to the judge's refusal to examine the applicant's motions for evidence. On 25 February 2008 a panel of three judges of the Kraków Regional Court dismissed his application. The applicant appealed. On 26 May 2008 the Kraków Court of Appeal upheld the first-instance court's decision. Both courts found that the fact relied on by the applicant did not call into question the impartiality of Judge Z.D. Moreover, the courts explained that had the applicant been dissatisfied with the judge's procedural decisions, he could challenge them in his appeal.

5. On 18 and 25 August 2008 the applicant submitted numerous motions for evidence to be adduced regarding the sources of information about M.G., which had been presented by the applicant during the press conference. The court dismissed his motions on procedural grounds as they were intended to prove notorious facts (e.g. a television broadcast of the applicant's press conference, the case-files of the criminal proceedings against M.G.) and were submitted only in order to delay the proceedings. Some of the facts the applicant sought to prove were admitted by the claimant and as such did not require a separate proof.

6. On 25 August 2008 the Kraków Regional Court gave judgment. It found that the applicant had infringed M. Garlicki's reputation. The court ordered the defendant to publish an apology directly after the main evening news programmes on the three national television stations (TVP, Polsat and TVN). The court awarded M.G. compensation in the amount of 7,000 Polish zlotys (PLN). It dismissed the remainder of his action. When establishing the facts, the court based its findings on the transcript of the press conference of 14 February 2007, various official and private documents,

press releases and rectifications issued by the Ministry of Justice and press articles.

7. As regards the question whether there was an infringement of M.G.'s personal rights, the Regional Court held that the applicant had damaged his reputation (*cześć*). In this respect it found, *inter alia*:

“... the statements included in the defendant's impugned announcement, including ... just the information about the prosecution's charges brought against the claimant (whose identification was a simple matter since his first name, the first letter of his surname, his place of employment and the function held, were given), without any need to refer to more categorical terms employed by the defendant such as 'no-one else will ever again be deprived of life by this man', or describing the claimant as a ruthless and cynical bribe-taker who de facto sentenced his patient to death and so on, objectively infringed the personal rights of the claimant...”.

8. Next, the Regional Court examined whether there had been any grounds to exclude the applicant's liability for unlawfully damaging M.G.'s reputation. The court held that the applicant's actions had been unlawful, having regard to the nature of the allegations made against the claimant and the limitations stemming from the principle of the presumption of innocence. In this respect, the Regional Court found *inter alia*:

“...it was or could have been within the powers of the Prosecutor General – the office held by the defendant at the material time – to inform the public about particular investigations and their progress, and also to disclose – within the boundaries set by the law – information regarding the suspect or the accused. ...

However, those persons so authorised do not enjoy 'complete freedom of expression' as asserted by the defendant if their actions are undertaken in the public interest. That principle, despite the defendant's assertion to the contrary, has not been accepted in the jurisprudence of the Polish courts; in particular it is not reflected in the position set out ... in the Supreme Court's judgment of 23 July 2007 (case no. II CKN 285/97). It was clearly indicated [in this judgment] that a negative assessment of a person's behaviour expressed by a State authority (or official) is not an unlawful assessment where, although it was not sufficiently verified or justified in the specific circumstances (because, for example, of the erroneous assessment of certain facts or the lack of complete factual material), it was nonetheless made within the scope of statutory competences and within the boundaries of matter-of-fact necessity (*w ramach rzeczowej potrzeby*). ...

In the court's assessment, the critical statement of the defendant fell short of this obligation. Indeed, the defendant did not only state the charge of having committed an offence specified in Article 148 of the Criminal Code as brought against the claimant on the basis of the prosecution's decision and the circumstances justifying it, but in his emotional, exaggerated, unbalanced and judgmental statement emphasised this charge in a manner which excluded any doubts as to its correctness (*lecz swoją emocjonalną, egzaltowaną, niewyważoną i ocenną wypowiedzią wyeksponował ów zarzut w sposób wykluczający jakiegokolwiek wątpliwości co do jego słuszności*). This effect was exacerbated by the statement that 'no-one else will ever again be deprived of life by this man' ... For in situations where there is unintentional deprivation of life it is rather accepted to use such terms as an accident, error, coincidence, misfortune or incident. ...

It should be stated once more that, at the press conference, no accurate information was given about the results of the investigation, [and] almost no concrete information about the investigation at all.

It should be underlined that the defendant undoubtedly had the right to disclose information related to the charge brought against the claimant; however due to the risk of misinterpretation of this information by the recipients he should have refrained from statements giving rise to belief in the claimant's guilt. The more so since as the Prosecutor General, responsible for safeguarding the rule of law (section 2 of the Prosecution Authorities Act of 20 June 1985), [he] had the duty to comply with the important principle of the legal order imposing respect for the defendant's presumption of innocence as a legally protected interest. In this connection, the defendant should have presented the information concerning the investigation, in particular in respect of the charge of homicide, in a moderate form, without passing his own judgment, which would go significantly beyond reporting on the proceedings. It should thus be considered that the behaviour of the defendant was not factual and cautious, [and] that the opinions expressed exceeded what was strictly necessary, and the terms employed were exaggerated in form and content."

9. With regard to the redress for the damage to M.G.'s reputation, the Regional Court partly modified the text of the apology. The court took into account the type of right infringed and the scope of the infringement. Concerning the enforcement of its judgment, it obliged the applicant to broadcast the apology at his expense.

10. As regards compensation for non-pecuniary damage suffered on account of the infringement, the Regional Court held that the applicant's fault, at least in the form of negligence, had been established. The use of words which suggested that M.G. had undoubtedly committed homicide had breached the principle of the presumption of innocence, thereby infringing the claimant's personal rights. At the relevant time the defendant had held the office of Minister of Justice – Prosecutor General, so he had been under a particular duty to formulate his statements carefully. The Regional Court awarded M.G. PLN 7,000 which it considered adequate in the circumstances, having regard to a number of relevant factors, including the gravity of the infringement and the extent of the damage suffered.

11. Both parties appealed. The applicant challenged the Regional Court's judgment in part allowing the claim. He argued that he had not infringed M.G.'s personal rights and, alternatively, that any such infringement had been in accordance with the law. He alleged that the court had erroneously applied substantive and procedural law. He also submitted that the order to publish the apology had taken the appearance of a financial sanction. In his appeal the applicant did not question the lack of impartiality of the Judge Z.D.

12. On 9 December 2008 the Kraków Court of Appeal held a hearing and gave judgment. It amended the first-instance judgment only in respect of the compensation for non-pecuniary damage awarded to M.G. which it increased to PLN 30,000. The Court of Appeal partly dismissed M.G.'s appeal and dismissed the applicant's appeal in its entirety.

13. The Court of Appeal noted that M.G. had established, in accordance with the burden of proof lying on him, that his personal right to respect for his reputation had been infringed by the applicant's statement "no-one else will ever again be deprived of life by this man". In that connection, it fully accepted the factual findings and legal assessment of the Regional Court. The infringement of the claimant's personal right had been evident as the defendant had indicated that the charge of homicide had been made against the head of a specific department of a particular hospital. As regards the damage to M.G.'s reputation, the Court of Appeal emphasised that the impugned statement was in breach of the constitutional and statutory principle of the presumption of innocence.

14. With regard to the presumption of unlawfulness of the infringement, the Court of Appeal held that the defendant had failed to rebut the presumption.

15. The Court of Appeal, having regard to all the factual circumstances of the case, including the significant publicity which the applicant's statement attracted in the media and the moral suffering of M.G., found that it would be appropriate to award PLN 30,000 for non-pecuniary damage.

16. The applicant lodged a cassation appeal against the Court of Appeal's judgment. On 29 October 2009 the Supreme Court refused to entertain his cassation appeal. It found that there had been no significant legal issue in the case which would justify the examination of the cassation appeal on the merits.

17. On an unspecified date the applicant paid M.G. the compensation awarded by the court. On 9 January 2010 the applicant's apology was broadcast.

COMPLAINTS

18. The applicant complained under Article 6 §§ 1 and 2 of the Convention about the lack of impartiality of Judge Z.D., the dismissal of his motions to adduce evidence, the wrongful assessment of the evidence as well as the unfavourable outcome of the proceedings.

19. Further, the applicant complained under Article 10 of the Convention that the unfavourable outcome of the civil proceedings had constituted an unlawful and disproportionate interference with his right to freedom of expression.

THE LAW

A. Complaint under Article 6 § 1 of the Convention

20. The applicant first alleged that his case had not been heard by an impartial tribunal referring to the alleged lack of impartiality of Judge Z.D.

21. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Court has thus distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (see *Piersack v. Belgium*, 1 October 1982, § 30, Series A no. 53, and *Grievés v. the United Kingdom* [GC], no. 57067/00, § 69, 16 December 2003). As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports of Judgments and Decisions* 1998-VIII, and *Morel v. France*, no. 34130/96, § 42, ECHR 2000-VI). When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 58, *Reports of Judgments and Decisions* 1996-III and *Wettstein v. Switzerland*, no. 33958/96, § 44, ECHR 2000-XII; *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII).

22. In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, 24 May 1989, § 47, Series A no. 154). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will or has arranged to have a case assigned to himself for personal reasons (see *De Cubber v. Belgium*, 26 October 1984, §25, Series A no. 86). The principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see, for example, *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 58, Series A no. 43).

23. With regard to the subjective impartiality, the Court does not discern any element in the case indicating that Judge Z.D. displayed personal bias. With regard to the objective impartiality, the applicant relied on the fact that in his capacity as Prosecutor General he referred for further examination a complaint from a third party against a decision to discontinue the

investigation into the case of alleged abuse of power by Judge Z.D. The domestic courts found at two instances (see paragraphs 7-10 above) that these circumstances did not call into question the impartiality of Judge Z.D. The Court for its part agrees that the circumstances invoked by the applicant did not objectively justify his misgivings as to the lack of impartiality of Judge Z.D. (see *Kyprianou v. Cyprus* [GC], cited above). It may also be noted that the applicant failed to raise the issue of alleged lack of impartiality of Judge Z.D. in his appeal against the Regional Court's judgment.

24. Having regard to the above, the Court finds that the complaint under Article 6 § 1 of the Convention concerning the alleged lack of impartiality of Judge Z.D. is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

25. As regards the second part of the complaint under Article 6 § 1 of the Convention, the Court reiterates that, in accordance with Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 § 1 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national court (see *Garía Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999 I, with further references; *Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V). In the present case, the domestic courts carefully and diligently examined the evidence provided by the parties to the proceedings and the decisions to dismiss certain motions in this matter had been duly justified in the reasonings of the courts' judgments.

The applicant additionally invoked Article 6 § 2 of the Convention, however the Court notes that on the facts of the case no separate issue arises with respect to this provision.

26. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that the remainder of the applicant's complaint under Article 6 § 1 does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Complaint under article 10 of the Convention

27. The applicant complained under Article 10 of the Convention that the unfavourable outcome of the civil proceedings had constituted an unlawful and disproportionate interference with his right to freedom of expression. The Court notes that the domestic courts' decisions complained of by the applicant amounted to "interference" with the exercise of his right to freedom of expression. The Court also finds that the interference complained of was prescribed by law, namely Articles 23 and 24 of the Civil Code, and pursued the legitimate aim referred to in Article 10 § 2 of the Convention, namely "the protection of the reputation or rights of others". It remains to be established whether the interference was "necessary in a democratic society" (see for general principles, *Cumpăna and Mazăre v. Romania* [GC], no. 33348/96, §§ 88-91, ECHR 2004-XI, with further references).

With regard to the specific circumstances of the present case, the Court recalls that the freedom of expression guaranteed by Article 10 of the Convention includes freedom to receive and impart information. Article 6 § 2 of the Convention cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (see *Miroslaw Garlicki v. Poland*, cited above, § 132; *Allenet de Ribemont v. France*, 10 February 1995, § 38, Series A no. 308; *Peša v. Croatia*, no. 40523/08, § 139, 8 April 2010). The Court has considered that in democratic society it is inevitable that information is imparted when a serious charge of misconduct in office is brought (see *Arrigo and Vella v. Malta* (dec.), no. 6569/04). It has acknowledged that in cases where an applicant was an important political figure at the time of the alleged offence the highest State officials, including the Prosecutor General, were required to keep the public informed of the alleged offence and the ensuing criminal proceedings. The Court has however emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence. It has also asserted the importance of respect for the presumption of innocence during press conferences by state officials or in their interviews with the press (see *Butkevičius v. Lithuania*, no. 48297/99, §§ 50-52, ECHR 2002-II (extracts); *Lavents v. Latvia*, no. 58442/00, §§ 126-127, 28 November 2002; and *Y.B. and Others v. Turkey*, nos. 48173/99 and 48319/99, § 45, 28 October 2004). In any event, the opinions expressed must not amount to declarations by a public official of the applicant's guilt which would encourage the public to believe him or her guilty and prejudge the assessment of the facts by the competent judicial authority (see *Butkevičius*, cited above, § 53, *Konstas v. Greece*, no. 53466/07, § 45, 24 May 2011).

28. In the present case the alleged violation resulted from the statement of the applicant, then Minister of Justice – Prosecutor General, that “no-one else will ever again be deprived of life by this man”, which was delivered at the widely broadcast press conference held directly after M.G.’s detention on remand (see *Mirosław Garlicki v. Poland*, cited above, § 132). It was established in the domestic proceedings (see paragraphs 7-20 above) that the applicant fell short of the obligation to inform the public about the investigation against M.G. with due circumspection. The domestic courts found that the applicant did not provide neutral information to the public but violated M.G.’s presumption of innocence by his statement at the press conference. The Court shares the findings made by the domestic courts which took due account of its own case-law.

29. Having regard to the foregoing, the Court finds that the reasons adduced by the national authorities in the reasonings of the above-mentioned judgments were “relevant and sufficient” for the purposes of paragraph 2 of Article 10 and it cannot be said that the national authorities overstepped the margin of appreciation, in respect of sanctions imposed on the applicant, in assessing the necessity of the measures applied in the circumstances of the present case (see, among others, *Janowski v. Poland* [GC], no. 25716/94, ECHR 1999 I).

30. Having regard to the above, the Court finds that the complaint under Article 10 of the Convention is manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected, pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Fatoş Aracı
Deputy Registrar

Ledi Bianku
President