CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 2428/05
by Andrzej WYPYCH
against Poland

The European Court of Human Rights (Fourth Section), sitting on 25 October 2005 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged on 16 December 2004,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Andrzej Wypych, is a Polish national who was born in 1954 and lives in Kwidzyń. He was represented before the Court by Ms Beata Czech, a lawyer practising in Kwidzyń.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant was elected to the Kwidzyń Town Council during the municipal elections of October 2002 and has served as a councillor since that date. His term of office lasts four years.

On 1 January 2003 amendments to the 1998 Local Government (County) Act, enacted in November 2002, came into force. These amendments impose an obligation on local councillors to disclose information to the public concerning their financial situation and property portfolio. This is to be done through a declaration which is submitted to the president of the local council. These declarations are subsequently published in the Public Information Bulletin, available to the general public via the Internet.

In February 2003 the applicant asked the Ombudsman to lodge a request with the Constitutional Court to examine whether the provisions of the 1998 Act, as amended in 2003, were compatible with the Constitution insofar as they imposed an obligation on local councillors to make detailed information available to the general public about their property and income. The applicant argued that the provisions of the 1998 Act had not previously provided for such a disclosure. He was of the opinion that this obligation was in breach with the 2001 Protection of Personal Data Act. He argued that making such information publicly available would facilitate political harassment and could expose him and his family to the threat of theft or burglary. He could refuse to submit a declaration, but he would then be deprived of the monthly emoluments payable for his work as councillor. He drew the Ombudsman's attention to the fact that, even in such a scenario, he would not be deprived of his office. In his view, this cast doubt on the effectiveness of the obligation to submit the impugned declaration. Insofar as declarations were designed to curb corruption, it was illogical that a failure to submit such a declaration would not result in removal from office.

In his replies of 20 March, 8 May and 13 August 2003, the Ombudsman indicated that he was in receipt of voluminous correspondence drawing attention to various aspects of the transparency obligations imposed by the 2002 amendments to the 1998 Act. His correspondents argued that the scope of the obligation to make publicly available details pertaining to the financial situation of various local politicians and officials was too extensive and breached the right to respect for private and family life. In the light of the public reaction to those amendments, the Ombudsman was considering whether to ask the Constitutional Court to examine their compatibility with the Constitution.

Eventually, however, after analysing various provisions of the Act, the Ombudsman complained to the Constitutional Court only about those amendments to the 1998 Act which imposed a wide-ranging obligation on certain local politicians to submit declarations about various aspects of the business activities of their close and extended families, in particular insofar as these activities concerned companies owned or co-owned by local municipalities.

In a judgment of 13 July 2004, the Constitutional Court found certain of those provisions constitutional and declared others incompatible with the Constitution. However, it did not examine the obligation complained of in the present case, but only dealt with those obligations under the amended 1998 Act which related to the business activities of local politicians' families.

The applicant does not wish to disclose details about his income and property as required by the 1998 Act as amended. He has not submitted a declaration as required. Consequently, he has received no emoluments for his work as a councillor since July 2003, these emoluments amounting to 1,190 zlotys (PLN) per month.

B. Relevant domestic law and practice

1. Relevant constitutional provisions

Article 61 of the Constitution reads:

> Every citizen shall have the right to obtain information on the activities of public bodies and of persons discharging public functions. This right shall also include the receipt of information on the activities of self-governing economic or professional bodies and other persons or organisational units in connection with fields in which they perform public duties and manage communal assets or property belonging to the State Treasury.
>
> The right to obtain information shall guarantee access to documents and entry to the sittings of collective public bodies which have been formed by universal suffrage and shall include the opportunity to make sound and visual recordings.
>
> Limitations on the rights referred to in paragraphs 1 and 2 above may be imposed by statute solely in order to protect the freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State.
>
> The procedure for the provision of information referred to in paragraphs 1 and 2 above shall be specified by statute and, as regards the Sejm and the Senate, by their rules of procedure.

Article 47 of the Constitution provides:

> Everyone shall have the right to legal protection of his private and family life and of his honour and good reputation and the right to make decisions about his personal life.

Article 79 § 1 of the Constitution provides as follows:

> "In accordance with principles to be specified by statute, everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or other normative act on the basis of which a court or an administrative authority has issued a final decision concerning his freedoms or rights or on his obligations as set out in the Constitution."

2. Relevant judgments of the Constitutional Court

By a judgment of 23 June 1999 the Constitutional Court examined a request to examine the compatibility with the Constitution of the 1997 Act on Restrictions on Business Activity of Persons Carrying Out Public Functions (which was later replaced by the legislation complained of in the present case).

In this request the complainants argued that the provisions of the 1997 Act insofar as they prevented members of executive boards of local councils and various other officials of local administration from conducting business activities on their own account were incompatible with the Constitution. This was because, the complainants averred, they imposed undue restrictions on business freedom guaranteed by its Article 22 of the Constitution. It was also argued that these restrictions were in breach of the principle of equality guaranteed by its Article 32.

The Constitutional Court recalled the history of legislation intended to limit the scope of business freedom of persons engaged in various bodies of local government since the first such law was adopted in 1992. It reiterated that these laws were to curb possible corruption by making it impossible for certain categories of public officials to combine their public functions with business activity.

The Court further considered that the provisions complained of could not be said to breach the principle of equality as guaranteed by the Constitution. This principle meant that all persons having the same legally relevant characteristics were to be treated equally, without differences to their advantage or disadvantage. However, this principle accepted that different classes or groups of persons be treated differently (K17/95).

In this connection, it reiterated that the case-law of the Court regarding restrictions of business activity of persons holding public functions was already established in that it had repeatedly held that such persons had to expect that such restrictions would be imposed on them. It recalled that these restrictions were meant to prevent public officials from engaging in situations and dilemmas of such a nature as to be capable of not only casting doubt on their personal honesty and integrity, but also of undermining authority of the State's bodies and of weakening the trust of the electorate and public opinion in their functioning (W 2/94).

The Court referred to its judgment given in 1995 in which it had stated that the legislature was empowered to impose various restrictions on local councillors in respect of their professional activities, provided that such limitations would be reasonably linked to public interest they were intended to serve and that the scope of such limitations remained proportionate to the importance of such public interest (K 29/95).

As regards the temporal scope of application of the 1997 Act, the Court noted the complainants' argument that the introduction of that Act adversely the legal situation of the public officials concerned in that it had extended

during their mandate the scope of limitations applicable to them. The Court considered that the prohibition on laws which harmed the position of individuals applied only to existing legal relationships within the area of civil, social insurance or administrative law. It could not be interpreted in such a way as to constitute a total ban on the introduction of new public law regulations which would be less advantageous for persons carrying out public functions during their mandate. It was of the view that such persons could not be considered as having any 'acquired rights' in respect of the conditions of their mandate that could be compared to such rights within the meaning of this term for the purposes of civil or social insurance law.

3. Currently applicable statutory provisions on the declarations to be made by local politicians concerning their financial situation and assets

Under Article 25 (c) § 1 of the Local Government (County) Act of 5 June 1998 as amended in 2002, local councillors, members of local government executive boards, executive secretaries to county councils and members of governing boards of legal entities with legal personality, such as companies owned or co-owned by local municipalities, are to submit declarations on their financial situation and property portfolio, hereinafter referred to as "declarations".

The declarations must cover their personal property and assets owned as marital property, and must list the following assets: savings and other liquid assets, all immovable property and shares and actions in public companies owned by both public-law and private-law persons. The declarations must also include information on property purchased by way of tender from any public-law entities and information about businesses owned or run by the persons obliged to submit declarations.

The obligation to submit a declaration also covers information on income earned in the context of paid employment or any other income-generating professional or business activity. Further, information on all movable property exceeding PLN 10,000 in value is to be included. Information on all loans of over PLN 10,000 taken out by the individual concerned and the conditions under which these loans were granted is to be disclosed.

Pursuant to Article 25 (c) § 5 of the Act, the declaration must be submitted within thirty days of the date on which a councillor makes a solemn oath to perform his or her duties honourably. Councillors' declarations are to be submitted to the President of the County Council.

Declarations are to be submitted for each calendar year until 30 April of the following year at the latest, and also two months prior to the end of a councillor's term of office.

The declaration is to be accompanied by a copy of the annual income-tax declaration for the relevant year.

Declarations are to be submitted on a standardised form, provided in the Ordinance issued by the Prime Minister on 26 February 2003.

The president of the local council is empowered to examine the declaration submitted by councillors and is obliged to transmit a copy to the local tax office.

A copy of the declaration is to be kept for six years in the local council's public records.

Under Article 25 (c) § 8, the local tax office is empowered to examine whether the declaration is compatible with the councillor's income-tax declaration for the relevant year. Where doubts arise as to its veracity, the president of the local council or the tax office may request the local tax inspectorate to institute a tax audit procedure in respect of the councillor.

Pursuant to Article 25 (c) § 12, the president of the council is obliged to submit a report to the council by 30 October each year, listing those councillors who have failed to submit declarations. This report should include information about any irregularities discerned in the declarations and about any measures taken in connection with these irregularities, such as those provided for in section 25 (c) § 8 of the Act.

Under Article 25 (d), the information contained in the declaration is to be made public, with the exception of councillors' home addresses and the address of other real estate that they own.

Pursuant to Article 25 (f), a councillor who fails to submit a declaration will not be paid his or her monthly emoluments until such time as a declaration is duly submitted.

Electronic copies of all submitted declarations are accessible to the general public through the Public Information Bulletin, as provided for in the 2001 Access to Information Act.

Pursuant to Article 8 of the Access to Information Act, a Public Information Bulletin has been created. It is an official publication and is accessible to the general public via the Internet. The Minister of Public Administration is responsible for its creation and functioning. He or she is also responsible for ensuring that all public-law entities which are legally so obliged submit any information which is to be made public and that the Bulletin's home-page contains links enabling visitors to access all such information.

COMPLAINTS

The applicant is of the view that, although the 1998 Local Government (County) Act was enacted for the laudable purpose of curbing corruption, the obligation to disclose details concerning his financial situation and

property portfolio imposed by that legislation is in breach of Article 8 of the Convention.

He claims that this is so because his right to respect for his private and family life has been breached by public access to unreasonably extensive and detailed information about his financial resources and his and his family's property. The law does not provide for the possibility of submitting a partial declaration. Anyone can therefore have access to this sensitive information about local councillors, thus exposing the applicant to danger from criminals who could, in the light of this information, select him as a target for robbery or assault.

Admittedly, he is not obliged to give his address in the declaration. However, on common-sense grounds, this does not reduce the danger, given that in small towns such as Kwidzyń information about a councillor's home address is likely to be public knowledge in any event. In those circumstances, the public disclosure of detailed information about any piece of property exceeding PLN 10,000 in value is practically an invitation to commit burglary.

The scope of this obligation is excessive in that detailed information about objects of relatively small value is to be disclosed to the general public. It is therefore disproportionate to the aim of curbing corruption, as the possible and unlikely advantages that the general public could gain from being informed, down to the last detail, about any local politician's financial situation is not outweighed by the serious and direct inconvenience that the applicant would suffer if he were to comply with the obligation to submit the required declaration.

Since the law provides that emoluments are not to be paid to councillors who refused to comply with the obligations imposed by the 2003 Act, the applicant receives no emoluments. This is a measure of a punitive character.

The applicant further submits that he signed an employment contract with a large private company, prohibiting him from disclosing information about his salary, on pain of a finding that there had been a breach of professional and employment confidentiality. Were the applicant to make public information about his salary as required by the 2003 Act, this could result in loss of his employment.

He is therefore under conflicting obligations, on the one hand with regard to his employer and on the other with regard to the requirement imposed by the legislature. The latter makes serious and unnecessary inroads into his and his family's privacy.

THE LAW

The applicant is of the view that, although the relevant legislation had been enacted for the laudable purpose of curbing corruption, the obligation imposed on him under the Local Government (County) Act to disclose details concerning his financial situation and property portfolio is in breach of Article 8 of the Convention.

This is so because his right to respect for private life has been breached by unlimited public access to extensive information about his financial resources and his and his family's property. The scope of this obligation is excessive and disproportionate to the aim sought by the legislator.

Article 8 of the Convention, insofar as relevant, reads:

> "1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

(a) The Court must first ascertain whether the applicant can claim to be a victim of the provisions complained of.

The Court notes in this respect that the applicant refused to comply with the obligation to make a declaration about his financial situation and property portfolio and submit it to the president of the local council. As a result, this information was not disclosed and is not presently stored in the public domain as provided by both the 1998 Local Government Act and the 2001 Access to Information Act. Hence, the applicant cannot claim to be a victim of the operation of these provisions in this sense.

However, the Court further observes that, having refused to submit the declaration, the applicant is subject to the sanctions set out in section 25 (f) of the 1998 Act. His failure to submit the relevant declaration has resulted in the loss of those emoluments to which the applicant normally would be entitled for his work as a local councillor, amounting to PLN 1,190 per month.

The Court is therefore of the view that the applicant can claim to be a victim of a breach of the Convention.

(b) Under Article 35 § 1 of the Convention, the Court may only deal with the matter after all domestic remedies have been exhausted.

The Court observes that, with effect from 17 October 1997, Poland introduced the possibility of lodging individual constitutional complaints. A constitutional complaint may be lodged to challenge the constitutionality of a statute or other normative act which constituted the legal grounds for the final individual decision whereby a court or an administrative authority

determined individual rights and obligations (see Article 79 of the Constitution).

The Court reiterates that, having examined the characteristics of the Polish constitutional complaint and having analysed the limitations as to its scope and as to the form of redress it provides, it has previously found that the constitutional complaint is an effective remedy for the purposes of Article 35 § 1 of the Convention in situations where the alleged violation of the Convention resulted from the direct application of a legal provision challenged by the complainant as unconstitutional.

In the present case, however, the Court leaves open the question whether the applicant should have lodged a constitutional complaint with the Constitutional Court in order to challenge the impugned provisions, since the application is in any event manifestly ill-founded for the reasons set out below.

The Court must determine whether Article 8 of the Convention is applicable to the circumstances of the case.

In this connection, it points out that the term "private life" must not be interpreted restrictively. In particular, respect for private life comprises the right to establish and develop relationships with other human beings; furthermore, there is no reason of principle to justify excluding activities of a professional or business nature from the notion of "private life" (see *Niemietz v. Germany,* judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29, and *Halford v. the United Kingdom*, judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III, pp. 1015-16, § 42).

This broad interpretation corresponds with that of the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which came into force on 1 October 1985 and whose purpose is "to secure in the territory of each Party for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him" (Article 1), such personal data being defined as "any information relating to an identified or identifiable individual" (Article 2).

In the present case the Court notes that the provisions of the 2003 Act imposed on the applicant an obligation to disclose to the general public detailed information concerning his and his spouse's financial situation and property portfolio. He was thus obliged to make public information relating to their savings and other liquid assets, immovable property and shares and actions in limited liability companies owned by both public-law and private-law persons. The declaration was also to include information on property purchased by way of tender from any public-law entities and information on businesses owned and run by the individual required to make a declaration. He was also obliged to disclose information on income earned in the context of his employment or any other income-generating professional or business

activity. Further, information on all movable property exceeding PLN 10,000 in value was to be included, together with information on all loans of more than PLN 10,000 and the conditions attached to them.

The Court, having regard to the broad scope of information on the applicant's financial situation and to its detailed character, considers that the degree to which the applicant's and his family's financial standing is open to the public scrutiny justifies a conclusion that Article 8 of the Convention is applicable to the circumstances of the case.

Having regard to its finding that the applicant may claim to be a victim of the breach of the Convention, the Court will proceed from the assumption that there was an interference with his right to respect for his private life.

Accordingly, it has to be determined whether that interference was justified under paragraph 2 of Article 8, in other words whether it was "in accordance with the law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve the aim or aims in question.

As regards the first aspect, the Court observes that the measures complained of were explicitly provided for by the 1998 Act, read together with Articles 8 and 9 of the Access to Information Act. The Court finds nothing to suggest that the measures did not comply with domestic legislation or that the effects of the relevant law were not sufficiently foreseeable for the purposes of the quality requirement which is implied by the expression "in accordance with the law" in Article 8 § 2.

As to whether the measures complained of pursued the aims listed in this provision, the Court observes that they undoubtedly pursued the legitimate aim of "the prevention of crime", namely corruption, in connection with the local political process in local councils, by providing a legal framework for transparency with regard to councillors' financial situations and evaluation of them during the latter's terms of office.

It remains to be examined whether the interference complained of was "necessary in a democratic society" within the meaning of Article 8 of the Convention.

Under the Court's settled case-law, the notion of "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see, among many other authorities, *Camenzind v. Switzerland*, judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, p. 2893, § 44). In determining whether an interference is "necessary in a democratic society" the Court will take into account that a certain margin of appreciation is left to the Contracting States.

The Court observes in this connection that the decision to stand for election as local councillor is a voluntary one. Persons holding such functions are free to decide whether to take an active part in the local political process and it is not argued in the present case that the applicant

was in any different position in this respect. Being a member of an elected municipal body brings certain advantages naturally connected with active participation in political process, such as an opportunity to exert influence on the formulation of local policies. However, such functions inevitably entail responsibilities and even restrictions due to their public character.

The Court further recalls that a decision to run for public office is an occasion when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner. Consequently, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive factor (see *P.G. and J. H. v. the United Kingdom,* No. 44787/98, ECHR 2001-IX, § 57).

In this context, the Court observes that the function of a local councillor is political in nature, since it is the local council which deliberates and decides on many issues of crucial importance for the local community. It is in the nature of the democratic political process that the electorate may legitimately be interested in the conduct of local councillors in the exercise of their public mandate. The issue of the financial situation of persons holding such office is one of legitimate public interest and concern. It is inevitable that local politicians will be subject to many forms of pressure or lobbying by various vested interests. Thus, the issues involved in the present case relate to the principles which should govern their conduct and to the manner in which the public can scrutinise the local political process. In the Court's opinion, these are important issues which may give rise to serious public discussion.

Against this background, the Court takes into account that the various measures were different in character; it will therefore examine each measure in turn.

As regards the obligation to submit a declaration on the applicant's financial and property standing, the Court notes that it serves the purpose of ensuring transparency in the local political process. It also gives the public an opportunity to verify that this process is not tainted by undue pressure or inappropriate lobbying, or even by straightforward corruption. The Court further observes that no information on the councillors' financial situation is collected and stored by the authorities apart from that submitted by the councillors themselves pursuant to the 1998 Act's provisions. It also observes that information so submitted is not subject to any further processing, other than that provided for tax purposes (see below), the latter being universally applicable to all citizens.

As regards the scope of the information to be submitted under the 1998 Act, the Court acknowledges that it is quite comprehensive. However, the Court considers that it is precisely this comprehensive character which makes it realistic to assume that the impugned provisions will meet their objective of giving the public a reasonably exhaustive picture of councillors' financial positions. It further considers that the additional

obligation to submit information on property, including marital property, can be said to be reasonable in that it is designed to discourage attempts to conceal assets simply by acquiring them using the name of a councillor's spouse. Lastly, given the economic realities of contemporary Poland, a requirement to provide information on movable assets which exceed PLN 10,000 in value cannot be held to be excessive. The Court also observes that councillors are entitled to review the submitted information at annual intervals and to correct any information that entered the public domain and was subsequently found to be incorrect.

As regards the treatment of the information contained in the declaration, provided for by Article 25 (c) § 8 of the 1998 Act, the Court notes that those provisions entitle the tax authorities to examine the veracity of the declarations in the light of the individual's annual income-tax declaration. The Court observes that this serves the purpose of providing a safeguard against abuse or attempts by councillors to evade the obligation concerning their financial situation. Comparison of declarations with income-tax returns enables the authorities to establish the exactitude and honesty of information submitted by local politicians. As to the competence conferred by the Act on the local tax office and on the president of the local council, enabling them to request that tax audit proceedings be instituted where doubts arise as to the veracity of the relevant information, the Court notes that a tax audit can also be conducted in respect of any taxpayer. Accordingly, this option, which obviously provides an incentive to local politicians to provide exact information, cannot in itself be regarded as punitive in character.

Finally, with regard to public access to the declarations, which are published in the Public Information Bulletin and accessible to all interested parties via the Internet, the Court considers that this is a safeguard to ensure that the obligation to make declarations available is subject to public scrutiny. The general public has a legitimate interest in ascertaining that local politics are transparent and Internet access to the declarations makes access to such information effective and easy. Without such access, the obligation would have no practical importance or genuine incidence on the degree to which the public is informed about the political process.

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

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise ELENS-PASSOS
Deputy Registrar

Nicolas BRATZA
President