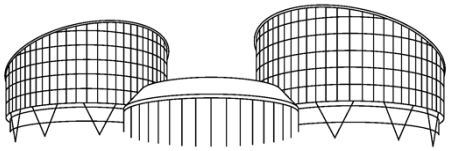

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MARIAN MACIEJEWSKI v. POLAND

(Application no. 34447/05)

JUDGMENT

STRASBOURG

13 January 2015

FINAL

13/04/2015

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

In the case of Marian Maciejewski v. Poland,

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

Ineta Ziemele, *President,*
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Krzysztof Wojtyczek,
Faris Vehabović, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 2 December 2014,

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

PROCEDURE

1. The case originated in an application (no. 34447/05) 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 Marian Maciejewski ("the applicant"), on 6 September 2005.

2. The applicant was initially represented by Mr A. Rzepliński, and subsequently by Mr A. Bodnar and Ms D. Bychawska-Siniarska, lawyers with the Helsinki Foundation of Human Rights, a non-governmental organisation based in Warsaw. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, succeeded by Ms J. Chrzanowska, of the Ministry of Foreign Affairs.

3. The applicant alleged a breach of Article 10 of the Convention on account of his conviction for defamation.

4. On 3 May 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and lives in Wrocław.

6. The applicant was a journalist with "*Gazeta Wyborcza - Gazeta Dolnośląska*".

7. On 25-26 November 2000 the newspaper published an article by the applicant entitled "The dishonest gaze of the Wrocław Themis" (*"Fałszywe spojrzenie wrocławskiej Temidy"*). The article carried a subtitle in small print "Thieves in the administration of justice" (*Złodzieje w wymiarze sprawiedliwości"*). It was one in a series of articles describing the alleged theft of valuable hunting trophies from the office of a former bailiff of the Wrocław-Krzyki District Court, Mr H.J.

8. The article read, in so far as relevant:

> "For the last three years we have been trying to solve the mysterious offences committed in 1995 in the Wrocław Themis building. Valuable hunting trophies valued at 200,000 Polish zlotys (PLN) were stolen by thieves in the administration of justice. The facts indicate that neither the Wrocław prosecution service nor the courts were interested in solving those cases in spite of articles we published on the subject at various stages of our investigation, and the witnesses and evidence we unearthed. It is not excluded that this offence is connected with the still unsolved theft of PLN 370,000 of deposits after the auction sale of properties [of wound-up companies]. (...)
>
> The audit of the bailiff's office carried out by an auditor of the Court of Appeal proved irregularities in the functioning of the court and of the bailiff in the course of auction sales concerning wound-up companies. On 20 October 1995 H.J., as he claims, on advice of his superiors, took leave and subsequently resigned. On 23 October 1995 bailiff Herbert L. took over the bailiffs' office [previously run by H.J. until his resignation]. Two days later, in the absence of Herbert L. and after working hours, M.K., a trainee bailiff, loaded the hunting trophies into his van. (...)
>
> In the autumn of 1997 we got hold of a copy of the list – prepared by M.K. – of 77 items removed by him. It is not known what happened to further 33 apparently most valuable ones whose value was estimated by hunters at PLN 200,000. (...)
>
> "This case does not interest me and I will not speak about it" – replied M.K., still an employee of the justice system, to our questions in January 1998.
>
> *Did the court provide a cover?*
>
> Already the form of the list raises suspicions. After the end of the list of items there is 10-centimter long empty space and then a note: "I received the above movables in the presence of M.K., a trainee bailiff (*praktykant komorniczy*) and I make no reservations. Except for the received items I leave no other personal items at the office." The signature of H.J. appears under the note.
>
> "Such empty sheets of paper served to order stationery" – tells us bailiff H.J., the injured party.
>
> "I would have never signed a statement that I did not leave my personal items at the office – continues H.J. – since I left them there and then they were formally returned to me. (...)"
>
> The successor of H.J. – bailiff Herbert L. – told us that he had not known about the removal planned by M.K., and the President of the Wrocław-Krzyki District Court, W.G., refused to talk to us. According to H.J., the injured party, it was the President of the Wrocław-Krzyki District Court who instructed him to hire the trainee M.K. (...). That is why – according to the bailiff – the court was never determined to solve this theft.

Logic like a flood – knocking you down

After our first publication in January 1998, H.J. lodged a criminal complaint against M.K. Half a year later the Stare Miasto Prosecutor's Office (...) discontinued the case, reasoning that the hunting trophies removed from the court in 1995 had been destroyed by a flood that had flooded the court building two years later (sic!). When "Gazeta" pointed out the absurdity of such reasoning, the prosecution reopened the case. The witnesses' statements unambiguously incriminated M.K.

However, the bill of indictment is still a long way away since no expert can value the missing trophies solely on the basis of their description. (...)

The court encloses fake list

Impatient with the dragging investigation, H.J. filed a compensation claim for PLN 200,000 against the Wrocław-Krzyki District Court. The case is being examined by the Legnica Regional Court, which has received a reply to the statement of claim prepared by a representative of the Wrocław Themis. Judge D.S.-G. enclosed with her reply an unofficial photocopy of the photocopy (sic!) of the list of hunting trophies removed by M.K. on 25 October 1995. Our newspaper has had a copy of the list for the last three years. But the photocopy submitted by the Wrocław court contains important notes and stamps which are not on the copy in our possession. That proves that they [the notes and stamps] were added later to make it seem as if the trophies had not been stolen but lawfully restored to the owner.

Originals are multiplying

(...) Judge D.S.-G., who is representing the Wrocław Regional Court in the proceedings, is very surprised to see the same, yet entirely different lists. "I do not remember now who handed me this document, perhaps [somebody] from the Wrocław-Krzyki District Court. I never knew that there is a second [document], without notes and stamps (...)"

Therefore it is not clear when and where the list of removed items was forged: at the bailiff's office or at the court's office. (...)

The emotions stirred by two versions of the same document have not yet fallen when suddenly at the Legnica court appears ... its third version, confirmed as authentic by Judge J.J., the vice-president of the Wrocław-Krzyki District Court. (...)

Five minutes of "Gazeta"

When the above forgeries were revealed, H.J. filed a criminal complaint with the Stare Miasto Prosecutor's Office against persons unknown who had successively added notes, stamps and signatures to the document. After four weeks he received a reply – a refusal to open an investigation. Prosecutor I.S., without making any attempt to elucidate anything, found that no forgery had been committed. The prosecutor did not want to speak to us about it.

H.J. appealed against this decision to the Wrocław-Śródmieście District Court and attached the latest article of "*Gazeta Dolnośląska*" in which we had related the journalistic findings. (...) The court allowed the bailiff's appeal. In a detailed reasoning it relied, *inter alia*, on the findings made in our article and instructed the prosecutor's office to elucidate the issues raised therein.

Prosecutor as fast as InterCity

Considering that the theft of trophies would not have been possible had W.G., the President of the Wrocław-Krzyki District Court, fulfilled her duties (secured the

bailiff's office and formally handed it over) H.J. filed a criminal complaint [against her] with the Stare Miasto Prosecutor's Office in December of last year.

On 20 January [2000] the prosecutor interviewed H.J. for three hours.

Nonetheless – it transpires from the documents – that already on the following day prosecutor W.K. refused to open an investigation. She wrote in the reasoning that she had familiarised herself with case files (the one concerning irregularities in the course of auction sales in which H.J. appears as an accused and the other concerning the theft of antlers in which H.J. is an injured party) and that "the enquiries did not reveal the facts which would substantiate that an offence had been committed".

"*Gazeta*" knows these case files, jointly it is nearly 30 volumes. It is not possible to duly familiarise oneself with them in just one day. Besides we are in the possession of official correspondence from which it transpires that in October of last year the case file of the first case – more than 20 volumes – were transferred by the Kalisz Regional Court to the Łódź Court of Appeal where they stayed at least until 16 February [2000]. (...)"

9. Subsequently the applicant described the role of prosecutor R.M.

"Who will solve the mystery?

The investigation concerning irregularities in the course of auction sale of properties of wound-up companies was conducted by R.M., a colleague of the Wrocław judges, almost from behind a wall. It was revealed during the investigation that the former owners of the properties concerned had not received PLN 370,000 paid as deposits by the buyers. The prosecutor remanded bailiff H.J. in custody for two years. According to the bailiff, the prosecutor refused all his requests in the course of the investigation; *inter alia*, he prevented him from having access to the case materials and refused to carry out a confrontation between him and the trainee M.K. "Because of this I did not agree with his charges and I did not sign the bill of indictment" – says H.J. We are in the possession of documents which indicate that initially the prosecutor did not allow the suspect (H.J.) to contact his lawyer. In the course of his arrest by the police H.J. stated to the record: "I request that my lawyer be contacted". A police officer also noted down the name of the lawyer and his phone number. However, in the subsequent record in the entry "lawyer" the prosecutor wrote: "does not have [a lawyer]".

The investigation revealed that M.K. had forged H.J.'s signatures, but the prosecutor discontinued the investigation against M.K. on account of the insignificant social danger of the act. (...)

On 15 October 1996 prosecutor R.M. closed the investigation and three days later a bill of indictment against H.J. together with all documents was transmitted to the court. However, we found in the case file a document exonerating M.K. from the theft of antlers, which was prepared by L.S., an employee of the bailiff's office (...). This document bears a date of 26 October 1996, that is 11 days after the investigation had been closed. It is unknown when and how [this document] was added to the case file because there is no date of receipt on it. (...)

M.G., a regional prosecutor in Wrocław confirms to us that such a course is incorrect. "After the investigation was terminated, only documents without relevance for the investigation may be added to the case file, i.e. a medical certificate of the accused" – he explains, declaring that he does not know the details of the case.

"I do not remember how this document was added to the case file. Perhaps the police sent it to me" – says R.M. (...)

"After the investigation was terminated?"

"I do not have the file in front of me so I cannot say anything on this issue. (...)"

In August [2000] H.J. lodged a criminal complaint against prosecutor R.M. with the Ministry of Justice, alleging that after the investigation had been closed R.M. added to the file a fabricated document with forged signature of M.K. (indeed, the signature of the trainee bailiff differs significantly from his proper signature). As it transpires from documents, the ministry transmitted the case to the Wrocław Appellate Prosecutor's Office, and the latter ... [transmitted it] to the Wrocław Regional Prosecutor's Office where R.M. is employed.

"And there has been no reaction to date. That is why, three years ago I turned for help to "*Gazeta*". It is another example that an ordinary man has no chance against the organised machinery of the law", – comments H.J.

A turning point?

On 22 March last year [1999] the Kalisz Regional Court convicted H.J. of misappropriation of PLN 370,000 and sentenced him to four years' imprisonment. H.J. appealed. He claimed that by reason of not having access to the documents of his office, he learnt only after the judgment had been given that M.K., the trainee bailiff had always cashed the cheques during H.J.'s absence at work. (...).

The Łódź Court of Appeal accepted this argument, quashed the conviction and remitted the case. The trial is pending. Perhaps it will finally answer who stole PLN 370,000 from the court building in 1995 and whether that has any connection with the still unresolved theft of the hunting trophies."

10. The article was accompanied by the applicant's editorial:

"Writing about those offences I frequently emphasised that it is the administration of justice which should care about their being clearly explained. That has always gone unheeded. H.J. has every right to be impatient when not seeing good will of the prosecution service and of Themis itself. Sometimes he insults the administration of justice. The court pretends that it is offended, and punishes H.J., but then, knowing that it is not flawless, it does not even attempt to enforce the penalties imposed. The esteem and authority of that court have hit a new low (*"sięgnął bruku"*). In his complaint to the State Prosecutor, H.J. alleged that this was a mafia-like prosecutor-judge association (*"mafijny układ prokuratorsko-sędziowski"*). Strong words. But until all those cases have been explained, and the guilty punished, it is difficult not to agree with him."

11. On 13 December 2000 the newspaper published a letter from Judge A.O., spokesperson for the Wrocław Regional Court. It read, in so far as relevant:

"Indeed, it would require a particular lack of objectivity, [and] a significant amount of bad faith (...) to allow the court and the people working there to be slandered in such a disgraceful manner without any factual grounds for the accusations.

In this article we have allegations made publicly against the Wrocław justice system of forgery of documents, theft, gross neglect of duty by the president of the district court, creating false evidence against the former bailiff H.J., the party wronged by the so-called "judge-prosecutor mafia", and finally a concluding comment about the esteem and authority of the court having hit a new low. (...)

Those words are insulting and unlawful at the same time, since the journalist has equated his own needs with the constitutional freedom of the press and the duty to serve society and the State in accordance with the principles of professional ethics and co-existence with others, by groundlessly criticising named officials of the Wrocław court, attempting once again in the case of H.J. to give a one-sided version of events favourable to the accused. (...)

There is no judge-prosecutor mafia attempting to "destroy" H.J.; I would simply like to point out that thanks to the initiative of the former president of the Wrocław-Krzyki District Court, Judge W.G., the prosecution service was informed of the irregularities not only in H.J.'s work but also in the work of one of the judges supervising him, which led to bills of indictment being filed against them. Today in the eyes of the journalist the name of Judge W.G. is treated on an equal footing with H.J., at least for the readers of the article. (...)

The justice system in Poland is not perfect and we are fully aware of that. But there are some intransgressible limits to the permissible criticism of that constitutional organ of the Republic of Poland, since undermining its authority in such a primitive and even deliberately unlawful manner undermines at the same time the foundations of the State. (...)"

12. In the same issue of the newspaper its editor-in-chief replied as follows:

"It was not the intention of the text to which you refer to undermine the constitutional authorities of the Republic of Poland.

The regrettable subtitle "Thieves in the administration of justice" assumed the ordinary, wider meaning of the [term] administration of justice. In phrasing it this way we obviously did not have in mind exclusively the State activity carried out by the independent courts which determine legal disputes in procedural forms. The administration of justice in the popular understanding encompasses all institutions and persons employed in the justice system who are more or less connected with the law and its observance or enforcement. It was not our intention to insult the court and call judges thieves. If you and other judges interpreted it that way – I sincerely apologise.

[However,] other questions and doubts remain after the reading of Marian Maciejewski's text. You have written that a discussion with the journalist does not make sense. That is a pity. Not only because the doubts remain, but also because one is left with the impression that, apart from the aggressive letter, you avoid any discussion on the allegations raised in the article."

A. Criminal proceedings against the applicant

13. The President of the Wrocław Regional Court filed a criminal complaint against the applicant.

14. The investigation was conducted by the Opole District Prosecutor's Office. On 30 August 2002 the prosecution filed a bill of indictment with the Brzeg District Court. The applicant was charged under Article 212 § 2 of the Criminal Code ("CC") with two counts of defamation committed through the mass media. The first charge concerned defamation of officials (*pracowników*) of the Wrocław Regional Court and of the Wrocław-Krzyki District Court with the expressions: "thieves in the administration of

justice", "the esteem and the authority of the court has hit a new low" and "mafia-like prosecutor-judge association". According to the charge, these expressions had debased the officials in the public opinion and undermined the public confidence necessary for the discharge of their duties as judges and officials of the administration of justice.

15. The second charge related to the defamation of prosecutor R.M., who had allegedly misconducted the investigation against H.J. According to the charge, the applicant imputed that prosecutor R.M. had had connections with the judges in respect of whom he had conducted the investigation. Furthermore, he was charged with having imputed that the prosecutor had remanded H.J. in custody for 2 years, refused his requests for evidence to be adduced, prevented his access to the case file, failed to carry out a confrontation between H.J. and M.K., refused H.J.'s access to a lawyer and added a forged document to the case file.

16. Prosecutor R.M. joined the proceedings as an auxiliary prosecutor.

17. At the first hearing on 11 April 2003 the trial court decided to conduct the proceedings in private in accordance with the general rule concerning cases of defamation or insult set out in Article 359 (2) of the Code of Criminal Procedure.

18. On 2 April 2004 the Brzeg District Court gave judgment. It convicted the applicant of the first charge of defamation committed through the mass media, but discounted the expression "the esteem and the authority of the court have hit a new low" as that expression did not concern the Wrocław courts. The court also convicted the applicant of the second charge of defamation committed through the mass media in respect of prosecutor R.M. It cumulatively sentenced the applicant to a fine of PLN 1,800 (approximately 450 euros (EUR)). The court further ordered the applicant to pay PLN 1,000 (EUR 250) to a charity and to reimburse PLN 292 (EUR 73) in costs.

19. The District Court found *inter alia*:

> "(...) there are no grounds to conclude that the theft of the collection of hunting trophies – if such a theft actually took place and the trophies were of some value – was perpetrated by an employee of the court, and in particular by a judge or prosecutor. A trainee bailiff is not *de lege lata* and was not at the relevant time an employee of the court. In conclusion, there were no thieves in the administration of justice, contrary to what the defendant suggested in his article. The court also found no evidence of the existence of a mafia-like association between the prosecutors and judges in the jurisdiction of the Wrocław Regional Court. Accordingly, prosecutor R.M. could not have been part of it."

20. With regard to the charge of defamation of prosecutor R.M. the trial court found, *inter alia*:

> "The expression "a colleague of the Wrocław judges almost from behind a wall" suggests a certain association between the judges and prosecutors, an association of friendly nature in which such "friendliness" influences decisions. A certain familiarity

between the judges and the prosecutor suggests that it influences their decisions, while these decisions should be objective and impartial – such will be the impression of an average reader of the article. The accused must understand that he is responsible not only for the content of his publication (...), but also for the tenor of his article as well as for all those defamatory expressions which do not come directly from the accused but from which he did not distance himself (...)"

21. The trial court noted that the applicant had imputed an unusual level of incompetence to prosecutor R.M. With regard to the imputation that prosecutor R.M. had remanded H.J. in custody for 2 years, the court noted that the prosecutor had remanded H.J. in custody only at the initial period and subsequently it was a court which became competent to apply this measure. The trial court noted that the legal language had its specificities which distinguished it from literature, such as the need of precision. The journalists often "translate" legal language into popular language without consulting it with lawyers and this often led to absurdities and misrepresentations. The court opined that in matters of legal language the journalists could to a certain degree rely on the rules of law-making practice set out in the Ordinance of the Prime Minister of 20 June 2002 (*Rozporządzenie Prezesa Rady Ministrów w sprawie zasad techniki prawodawczej*).

22. With regard to further allegations against prosecutor R.M., the trial court found as follows:

"There is no evidence of the lack of impartiality in "refusing the bailiff's request by prosecutor R.M.". H.J. had access to the file and even if he did not have it in the course of the investigation he could have had access to it during the trial. The confrontation between H.J. and M.K took place, but perhaps it did not meet the expectations of the accused [H.J.]. However, in this case too the trial court could have carried out such a confrontation again and draw relevant conclusions from it. There is nothing unusual in the change of numbering of the pages in the case file, in particular in the course of the investigation when it could be intended to arrange the collected material in order. The bad faith of prosecutor R.M. who allegedly did not allow the accused's access to his lawyer has not been substantiated. The lawyer of H.J. or his substitute did not complain about the irregularities in the course of the investigation, and in particular that they were not allowed to see the accused. There is no doubt for the court that had such circumstances actually occurred they would have been raised by the defence. H.J. (...) filed a criminal complaint against R.M., alleging that after the investigation had been terminated R.M. had added to the file a counterfeit document with a forged signature of M.K. It should be noted that documentary evidence may be attached by each party at any stage of the proceedings, thus also after the investigation had been terminated. In any event, this added document was not a decisive document for H.J. (...)"

23. The trial court found that the applicant could not rely on the defence specified in Article 213 § 2 of the CC since he had failed to prove the truthfulness of his allegations of the presence of thieves in the administration of justice and of prosecutor R.M.'s mishandling the investigation against H.J. In addition, the applicant's article did not pursue any justifiable public interest but rather the private interest of the former bailiff H.J. The information provided by the latter served to a large extent as the basis for the impugned allegations. Referring to the case-law of the Supreme Court, the court observed that the journalistic right to criticise was not unlimited; in particular it did not extend to imparting unverified information concerning the State authorities. Furthermore, the applicant had portrayed a climate of corruption and incompetence defamatory of the court employees and the prosecutor.

24. The trial court noted that the present case involved a conflict between the constitutional freedom of speech and the right to have one's reputation protected. However, it found that the applicant had abused that freedom by infringing the personal rights of many honest persons and that such conduct could not go unpunished as it would encourage similar infringements in the pursuit of sensationalism. The trial court also noted that the fact of the applicant being a journalist did not confer on him any special status or the right to use words irresponsibly.

25. The court further found that it was unacceptable to express suppositions disparaging the justice system, in particular when they were based solely on subjective feelings ("mafia-like prosecutor-judge association", "thieves in the administration of justice") as had been held in the Supreme Court's decision of 10 December 2003 no. V KK 195/03. The trial court accepted the findings of the European Court of Human Rights in the *Prager and Oberschlick* case with regard to the need to protect public confidence in the judiciary and observed that the applicant, through his defamatory statements, had wrongly undermined such confidence.

26. As regards the sentence, the District Court took into account the significant number of persons who had been harmed by the applicant's article and the social danger of his act. Having regard to the personal characteristics of the applicant, the court sentenced him to the most lenient penalty, which was a fine and in setting its amount it took into account the financial situation of the applicant.

27. The applicant appealed. He contested the finding of his guilt and alleged that the trial court had erroneously assessed the facts of the case. In his submission, the first-instance court had misinterpreted the impugned statements from his article. In particular, the phrase "thieves in the administration of justice" concerned clearly M.K. and not a judge or a prosecutor. For the applicant, a trainee bailiff was an employee of the administration of justice. In any event, in 1998 M.K. was promoted to a junior bailiff (*asesor komorniczy*) and became an employee of the

administration of justice, while the applicant's article was published in November 2000. Furthermore, the applicant argued that the term "mafia-like prosecutor-judge association" was a value judgment and not a statement of fact as the court had interpreted it. Nowhere in the article was it suggested that prosecutor R.M. had been part of this association. The trial court also did not pay attention to the fact that the impugned article was a third article treating the same subject-matter.

28. The applicant averred that the phrase "a colleague of the Wrocław judges, almost from behind a wall" had not been defamatory of prosecutor R.M. It was a fact that the prosecutor was a colleague of the judges who worked in the same building. The applicant did not allege that the carrying out of the investigation by prosecutor R.M. had influenced its outcome. On the other hand, he noted that such a situation could have raised an issue of objectivity of the prosecutor. The applicant claimed that the trial had erroneously found him guilty of imputing that prosecutor R.M. had added document to the case file. He averred that the court had simply not explained the circumstances in which the document had been added to the file. The trial court left unnoticed the fact of three different versions of the list of trophies. The applicant objected to the court's finding that he had defamed prosecutor R.M. by the phrase "the prosecutor remanded [H.J.] in custody for 2 years". It was true that the prosecutor actually remanded H.J. in custody only for a period of 9 months and in respect of the subsequent period it was a court. However, the prosecutor applied for and argued that the imposition of this measure was necessary.

29. The applicant disagreed that when writing about legal affairs a journalist was required to use legal language. He noted that *Gazeta Wyborcza* was a private newspaper and it was up to it to decide about the editorial policy and the style of language used. It was not a specialised journal but a newspaper addressed to a mass reader and that the use of popular language was justified. The applicant submitted that he did not intend to write an article favourable to the Regional Court but an article which portrayed the functioning of the administration of justice where a theft of movables and forgery of a document occurred.

30. The applicant submitted that he had shown sufficient diligence when preparing his article. He had verified his information and known the story perfectly well, collected hundreds of documents, talked to at least twenty-eight persons, mostly employees of the Wrocław courts. He maintained that Judge A.W., a spokesperson of the Wrocław Regional Court stated at the trial that the applicant had had good understanding of legal matters. In the applicant's view, the trial court wrongly undermined his credibility by having imputed that he had relied solely on the information provided by H.J. The applicant also submitted that following a complaint from H.J. the Wrocław-Stare Miasto District Prosecutor's Office opened an investigation into the excess of authority by prosecutor R.M. However,

subsequently the file of this investigation got lost in unknown circumstances and was never fully reconstituted.

31. The Opole Regional Court granted leave to the Helsinki Foundation for Human Rights to join the proceedings as a civil society organisation (*przedstawiciel społeczny*). The Foundation submitted its *amicus curiae* brief in the case.

32. On 22 February 2005 the Opole Regional Court upheld the first-instance judgment. It ordered the applicant to reimburse PLN 200 (EUR 50) in costs.

33. The Regional Court endorsed the findings of the trial court. It found, *inter alia*, that:

> "The words "thieves" and "mafia-like association" used by the accused amount to a pejorative assessment of the institutions indicated in the article. (...) The accused's efforts in the impugned article show that he deliberately misinformed the readers that the stealing prevails in the administration of justice system and his subsequent interpretation of the text was aimed at minimising the fact that he attributed dishonesty to the employees of the administration of justice."

The Regional Court emphasised that a journalist was required to act with particular diligence required by section 12 of the Press Act and in accordance with the relevant deontological standards. It noted that the assessment of the journalist's intention and goals should be carried out by reference to an average reader. The court also referred to the case-law of the Strasbourg Court which specified that the administration of justice was not exempt from public control and criticism but nonetheless it had to be protected against unfounded and destructive attacks by the journalists.

34. It observed that defamation within the meaning of the Criminal Code consisted of raising an allegation in person or of disseminating an allegation that had been previously raised by another person. This meant that the offence of defamation could also have been committed by a person quoting a statement made by somebody else if the person quoting the statement clearly approved of it. The Regional Court found that in his article the applicant had approved of the statement of the former bailiff H.J. that there had been a "mafia-like prosecutor-judge association" in the Wrocław courts.

35. It noted that the administrative authorities of the Wrocław-Krzyki District Court should have not tolerated the practice of collecting of hunting artefacts by a bailiff in his office located in the court building. The President of that court, Judge W.G. admitted that she had made a mistake in not reacting to this situation. She instructed M.K. to remove the hunting trophies from the bailiff's office and this was later described in the applicant's articles. The Regional Court agreed that the manner of securing the property located in the bailiff's office had been contrary to the applicable rules. The Regional Court further held:

> "The disappearance or the theft of antlers (as it is consistently claimed by the accused) should not be a reason to attribute stealing to the employees of the justice

> system. Thus, the District Court has correctly held (...) that this type of articles do not pursue any justifiable public interest, but they undermine the interest of maintaining the authority of the judiciary. The justice system (...) [gives] decisions determining disputes before the courts and imposing sanctions on behalf of the State. It is not allowed to lay such a charge against the justice system (...) even in the case of the evidently inappropriate actions of the administrative authorities in the situation that occurred in the Wrocław-Krzyki District Court as regards the lack of suitable reaction to the conduct of bailiff H.J."

36. With regard to the defamation of prosecutor R.M., the Regional Court held:

> "The allegations reported in the press of his [the prosecutor's] connections with judges in respect of whom he conducted the proceedings, and of breaches of criminal procedure in the course of the investigation against H.J. (...) and even of having used forged documents indisputably exposed the prosecutor conducting the investigation to the risk of losing the confidence necessary for the discharge of his duties. A suspect has the right to make complaints to the relevant authorities. However, the publication in the press of these unverified and false allegations constitutes a defamation of the portrayed person. (...)"

The appellate court underlined that the evidence in the case had not indicated that the investigation against H.J. was in breach of the criminal procedure or that it impeded the suspect in adducing his evidence or arguments in pursuance of his defence.

37. The Regional Court's judgment was served on the applicant on 8 March 2005.

38. On 3 June 2005 the applicant filed a constitutional complaint with the Constitutional Court. He claimed that Articles 212 § 2 and 213 § 2 of the CC were incompatible with Article 54 in conjunction with Articles 31 § 3 and 14 of the Constitution.

39. On 12 May 2008 the Constitutional Court gave judgment (case no. SK 43/05). It examined the constitutionality of the defence provided in Article 213 § 2 of the CC in respect of the offence of defamation committed through the mass media (Article 212 § 2 of the CC). The Constitutional Court ruled that Article 213 § 2 was compatible with the Constitution in so far as it required that an allegation had to be true. It held, however, that this provision was unconstitutional in so far as it necessitated that a true allegation concerning the conduct of a public official had to pursue a justifiable public interest. It further discontinued the proceedings in respect of the constitutionality of Article 212 § 2 of the CC, having regard to its earlier judgment of 30 October 2006 in the case no. P 10/06.

B. Civil proceedings against the applicant

40. On an unspecified date in 2001 Judge W.G. brought a civil action against the applicant and the editor-in-chief of the newspaper for

infringement of her personal rights on account of certain passages in the impugned article.

41. On 9 December 2003 the Świdnica Regional Court partly granted the claim and ordered the defendants to publish an apology in the newspaper. The defendants appealed. On 29 June 2004 the Wrocław Court of Appeal amended the first-instance judgment in respect of the text of the apology. The defendants appealed.

42. On 7 July 2005 the Supreme Court quashed the Court of Appeal's judgment and remitted the case. It held that the Court of Appeal had breached the principle of *reformationis in peius*. On 6 April 2006 the Wrocław Court of Appeal dismissed the claim of Judge W.G. in its entirety. It found that the impugned passages in the article did not contain untrue information infringing the personal rights of the claimant.

C. The investigation in the case concerning excess of authority by prosecutor R.M.

43. It appears that in 1998 H.J. filed a criminal complaint against prosecutor R.M. He alleged that the prosecutor had exceeded his authority in the criminal investigation conducted against H.J. in 1995-1996. Secondly, H.J. alleged that the prosecutor had forged his signature on a document from the investigation.

44. On 2 March 2005 the Wrocław-Stare Miasto District Prosecutor discontinued the investigation. She concluded that the prosecution in respect of the first charge had become time-barred. With regard to the second charge and having regard to an expert report, the prosecutor found that no offence had been committed.

D. Criminal proceedings against M.K.

45. On an unspecified date in 2001 the Wrocław-Stare Miasto District Prosecutor opened an investigation against M.K. On 16 November 2001 the prosecutor filed a bill of indictment with the Wrocław-Śródmieście District Court against M.K. M.K. was charged with theft of hunting trophies and forgery of the list of trophies. The case was transferred to the Ostrów Wielkopolski District Court. On 18 June 2002 that court remitted the case to the prosecution on account of shortcomings in the bill of indictment. It appears that on 29 November 2002 the Wrocław-Stare Miasto District Prosecutor discontinued the investigation against M.K. A copy of this decision has not been produced by the parties.

E. Criminal proceedings against H.J. concerning the charges of embezzlement

46. In 1995 the Wrocław Regional Prosecutor Office opened an investigation against H.J. The investigation was conducted by prosecutor R.M. On 19 January 1996 prosecutor R.M. remanded H.J. in custody.

On 18 October 1996 the prosecution filed a bill of indictment against him with the Wrocław Regional Court. H.J. was charged with numerous counts of embezzlement. H.J. was released on 14 November 1997. On an unspecified date the case was transferred to the Kalisz Regional Court.

47. On 22 March 1999 the Kalisz Regional Court convicted H.J. of embezzlement of PLN 370,000 and sentenced him to four years' imprisonment. Subsequently, the Łódź Court of Appeal quashed the conviction and remitted the case. On 22 May 2002 the Kalisz Regional Court again convicted the applicant of numerous counts of embezzlement and sentenced him to the same penalty. On 25 February 2003 the Łódź Court of Appeal upheld the first-instance judgment for the most part. It remitted the case only in respect of one count of embezzlement and reduced the sentence to three years and ten months' imprisonment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant constitutional provisions

48. Article 14 of the Constitution 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. Relevant provisions of the Criminal Code

49. Article 212 provides in so far as relevant:

> "§ 1. Anyone who imputes to another person, a group of persons, an institution, a legal person or an organisation without legal personality, such behaviour or characteristics as may lower that person, group or entity in public esteem or undermine public confidence in their capacity necessary for a given position, occupation or type of activity, shall be liable to a fine, a restriction of liberty or imprisonment not exceeding one year.
>
> § 2. If the perpetrator commits the act described in paragraph 1 through the mass media he shall be liable to a fine, a restriction of liberty or imprisonment not exceeding two years."

Article 213 provides as follows:

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

C. The Press Act

50. In accordance with section 12 § 1 (1) of the Press Act a journalist is under the duty to act with particular diligence in gathering and using the information, and, in particular, is required to verify the truthfulness of obtained information.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

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

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are

prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

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

B. Merits

1. The applicant's submissions

53. The applicant maintained that his article concerned the irregularities in the Wrocław judiciary which was an issue of public interest. He argued that the main duty of a journalist was to collect journalistic material with due diligence; however, there was no obligation to prove the truthfulness of all acquired information. Freedom of expression would be undermined if only those facts that could be proven were publishable. A particular example of this was when a journalist wrote an article about a person who was subject to criminal proceedings. In such a case, the journalist could not have known the eventual result of the proceedings at the time of writing. This was the situation in the applicant's case. After the publication of his articles, several sets of proceedings were opened against the members of the local judiciary. The proceedings against prosecutor R.M. for forgery had been discontinued on 2 March 2005. On 19 November 2001, a bill of indictment was lodged against bailiff M.K. accusing him of theft and forgery.

54. The applicant averred that the general practice of the Polish courts in criminal defamation cases was to require the accused to demonstrate the truthfulness of his statements. The courts did not take into account the manner in which a journalist collected his information. The applicant had relied on court documents from the proceedings conducted against the bailiff and the prosecutor as well as on many other sources that had been presented during the criminal proceedings against him. Being an investigative journalist, the applicant had verified the information before it was published and complied with professional ethics. His article made references to numerous sources of information.

55. In the reasons for its judgment the Opole Regional Court held that the applicant had been found guilty in respect of the subtitle of the article "Thieves in the administration of justice". It explained that the justice

system was composed of judges and therefore the applicant's statement had defamed Wrocław judges in general. However, the court failed to analyse the nature of the impugned statement which, in the applicant's view, had constituted an opinion based on the facts collected by the applicant and partially revealed in the article. Furthermore, in his appeal the applicant stressed that the subtitle had been added by the editors and that he had had no influence over their decision.

56. The applicant alleged that the trial and appellate courts had failed to make a distinction between opinions and facts. He had only expressed critical opinions whose truthfulness could not have been established and the same applied to the subtitle of his article. Furthermore, according to the Court's case-law, even a "slim factual basis" attracted the protection of Article 10 to a value judgment (cf. *Arbeiter v. Austria*, no. 3138/04, § 26, 25 January 2007). The numerous proceedings instituted against the local bailiffs and the evident irregularities in the judicial proceedings had constituted a sufficient basis for the applicant's assertions. The members of the justice system who had been described in the article exposed themselves to harsh criticism through numerous concrete irregularities in their professional conduct. Strong criticism was tolerated by the Court in its case-law in respect of the judiciary and judicial proceedings, namely the comparison of a trial to "medieval witch trials" or the use of expressions such as "tragicomic farce", "shameful judgment" or "legal farce". It should be noted that the strongest formulations were made in the subtitle which by definition had been made to attract the attention of a reader or in quotations from bailiff H.J. The applicant recalled that journalists had been allowed to use a degree of exaggeration or even provocation.

57. The applicant averred that there had been no "pressing social need" that could justify the interference with his freedom of expression. The trial court imposed on him the fine of PLN 1,800, obliged him to pay PLN 1,000 to a charity and to reimburse costs of the first (PLN 292) and the second-instance proceedings (PLN 200). The fine constituted an important financial burden for the applicant. Furthermore, the criminal sentence had had a significant impact on the applicant in that it had undermined his professional standing and had affected him emotionally. In addition, an entry of the conviction was made on the applicant's criminal record and it was erased only in 2010. The outcome of the proceedings had been further aggravated by the fact that the proceedings had been held in private.

2. The Government's submissions

58. The Government submitted that the complaint under Article 10 was manifestly ill-founded. They maintained that the restrictions on the applicant's freedom of expression had been prescribed by law (Article 212 § 2 of the Criminal Code) and had served the aim of maintaining the authority of the judiciary. In the long term it had also served

the aim of maintaining public safety and prevention of crimes. They emphasised that the authority of the justice system, its stability and credibility were of essential value in maintaining public order and combating crimes. These restrictions had been necessary within the meaning of Article 10 § 2 of the Convention in order to maintain the authority and the credibility of the justice system (cf. *Skałka v. Poland*, no. 43425/98, § 40, 27 May 2003).

59. The Government contested that the applicant had acted diligently. The applicant claimed that after the publication of his article several sets of proceedings against members of the local justice system had been instituted in order to substantiate his assertion of the alleged irregularities. However, he failed to inform the Court about the final result of those proceedings. For instance, in respect of the proceedings against M.K. who had been charged with theft of hunting trophies, on 18 June 2002 the case had been remitted by the Ostrów Wielkopolski District Court to the Wrocław-Stare Miasto Prosecutor's Office and never resubmitted for consideration of the merits. Furthermore, the applicant invoked the criminal proceedings against prosecutor R.M. for abuse of authority and forgery. However, the investigation against R.M. had been discontinued on 2 March 2005. Furthermore, the Government referred to the findings of the Supreme Court in the civil case brought against the applicant. According to the Government, the Supreme Court in its judgment of 7 July 2005 stated that the findings of the Wrocław Court of Appeal on the applicant's lack of due diligence had been correct. They further noted that the civil case against the applicant had been overturned by the Supreme Court not on the merits but on procedural grounds.

60. The Government averred that the applicant had not fulfilled his basic professional obligation of disseminating accurate and reliable information. Before the civil and criminal courts the applicant had had an opportunity to prove that the facts recounted by him had been true and reliable. However, in both civil and criminal proceedings the courts had declared the applicant's statements false. As early as in the bill of indictment the prosecution had provided several examples of the applicant's false statements tarnishing the good name of the local justice system. Furthermore, the Brzeg District Court established in its judgment that there had been neither thieves in the local justice system nor mafia-like prosecutor-judge association. The above proved that the applicant's statements had been defamatory and consequently undermined the public confidence in the local justice system. The Government underlined that the applicant's articles had referred only to the facts and that he had been convicted for dissemination of untrue facts. Furthermore, they disagreed with the applicant's assertion that the courts had failed to distinguish between the facts and value judgments.

61. The Government criticised the applicant for relying heavily on unverified facts provided by bailiff H.J. who had been convicted of embezzlement and sentenced on 25 February 2003 by the Łódź Court of Appeal to 3 years and 10 months' imprisonment. They also reproached the applicant for treating as equally reliable the information provided by H.J. and members of the local judiciary. The latter had been the first to address the irregularities in the work of H.J.

62. In the same vein, the Government referred to the Kalisz District Court's judgment of 30 March 2001, confirmed on appeal by the Kalisz Regional Court's judgment of 12 July 2001, in which bailiff H.J. had been convicted of insulting prosecutor R.M. (Article 226 § 1 of the Criminal Code) and sentenced to 8 months' imprisonment suspended on probation. Both judgments supported the Government's position that the applicant had based his articles on unverified facts relayed by H.J. Secondly, they corroborated the view that the applicant had acted to the detriment of the local justice system in Wrocław.

63. Furthermore, the domestic courts had provided detailed reasons for their decisions and explained why they had considered that the applicant's statements had amounted to defamation. With regard to the severity of the penalties, the Government submitted that, in their opinion, the applicant had overstepped the limits of acceptable criticism in the public debate by having published untrue factual information. In these circumstances, the level of fine (PLN 1,800) imposed on him appeared to have been relatively modest.

3. The Court's assessment

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

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

66. It has not been disputed that the interference was "prescribed by law", namely by Articles 212 and 213 of the Criminal Code. The Court further considers that the interference pursued the legitimate aims of "maintaining the authority of the judiciary" and of protecting "the reputation or rights of others".

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

(a) The test of "necessity in a democratic society" requires the Court to determine whether the interference corresponded to a pressing social need. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

(b) The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole, including the content of the statements held against the applicant and the context in which he or she has made them.

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

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

68. However, Article 10 of the Convention does not guarantee wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern and relating to politicians or public officials. Under the terms of its second paragraph, the exercise of this freedom carries with it "duties and responsibilities", which also apply to the press. These "duties and responsibilities" are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the "rights of others". By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see, among other authorities, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III; *Kasabova v. Bulgaria*, no. 22385/03, § 63, 19 April 2011).

69. In previous cases, when the Court has been called upon to decide whether to exempt newspapers from their ordinary obligation to verify factual statements that are defamatory of private individuals, it has taken into account various factors, particularly the nature and degree of the defamation and the extent to which the newspaper could have reasonably regarded its sources as reliable with regard to the allegations (*Bladet Tromsø and Stensaas*, cited above, § 66). These factors, in turn, require consideration of other elements such as the authority of the source (*Bladet Tromsø and Stensaas*, cited above), whether the newspaper had conducted a reasonable amount of research before publication (*Prager and Oberschlick v. Austria*, 26 April 1995, § 37, Series A no. 313), whether the newspaper presented the story in a reasonably balanced manner (*Bergens Tidende and Others v. Norway*, no. 26132/95, § 57, ECHR 2000-IV) and whether the newspaper gave the persons defamed the opportunity to defend themselves (*Bergens Tidende and Others*, cited above, § 58). Hence, the nature of such an exemption from the ordinary requirement of verification of defamatory statements of fact is such that, in order to apply it in a manner consistent with the case-law of this Court, the domestic courts have to take into account the particular circumstances of the case under consideration. If the national courts apply an overly rigorous approach to the assessment of journalists' professional conduct, the latter could be unduly deterred from discharging their function of keeping the public informed. The courts must therefore take into account the likely impact of their rulings not only on the individual cases before them but also on the media in general (see *Kasabova*, cited above, § 55 and *Yordanova and Toshev v. Bulgaria*, no. 5126/05, § 48, 2 October 2012).

70. An additional factor of particular importance in the present case is the vital role of "public watchdog" which the press performs in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see, *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports of Judgments and Decisions* 1997-I). The Court must apply the most careful scrutiny when the sanctions imposed by a national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern (see, among other authorities, *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04, § 88, ECHR 2007-III).

71. This undoubtedly includes questions concerning the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public (see *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 65, Series A no. 30). The press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner

that is in conformity with the aim which is the basis of the task entrusted to them. Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying (see *Prager and Oberschlick*, cited above, § 34; *Skałka v. Poland*, no. 43425/98, § 34, 27 May 2003; *Kobenter and Standard Verlags GmbH v. Austria*, no. 60899/00, § 29, 2 November 2006).

72. In the instant case, the applicant was found guilty of two counts of defamation committed through the mass media. The first count concerned defamation of the officials of the Wrocław courts on account of the expressions: "thieves in the administration of justice" and "mafia-like prosecutor-judge association". The second count concerned defamation of prosecutor R.M. for his alleged mishandling of the investigation against bailiff H.J. The Court will examine in turn the proportionality of the applicant's conviction in respect of each count of defamation.

73. With regard to the first count of defamation which concerned the phrases "thieves in the administration of justice" and "mafia-like prosecutor-judge association", the Court notes the following. The starting point of the article at issue was the disappearance or theft (as alleged by the applicant) of the private hunting trophies from the office of the former bailiff H.J. which was located on the court premises. The applicant described long and unsuccessful efforts of the former bailiff aimed at elucidating the circumstances concerning this event and establishing persons responsible for it. The applicant expressed his doubts about the procedure followed in respect of removal of the hunting trophies and the exactitude of the list of the trophies allegedly returned to the bailiff. He referred to the lack of proper administrative supervision of bailiff H.J. by Judge W.G., the then President of the Wrocław-Krzyki District Court which was subsequently confirmed in the proceedings against him (see paragraph 35 above). The applicant further described the civil proceedings for compensation instituted by bailiff H.J. against the Wrocław Regional Court in connection with the disappearance of the trophies. In those proceedings the representatives of the Wrocław Regional Court produced three different versions of the apparently same list of trophies as supposedly returned to the former bailiff H.J. The applicant also related a decision of the Wrocław Stare-Miasto Prosecutor's Office following a criminal complaint filed by H.J. against M.K. The Prosecutor's Office discontinued the investigation on the ground that the trophies which had disappeared in 1995 were damaged by a flood which had occurred two years later.

74. It is noteworthy that the above facts described by the applicant in his article were not contested in the defamation proceedings. These incontrovertible facts clearly point to certain irregularities in the functioning of the Wrocław courts and prosecution service related to the disappearance or theft of the hunting trophies. The irregularities in the functioning of the justice system are a matter of general interest which could be legitimately discussed by journalists or others engaged in a public debate (see, among other authorities, *Błaja News sp. z o. o. v. Poland*, no. 59545/10, § 60, 26 November 2013).

75. Another matter of importance which should be taken into account in the assessment of the proportionality of the interference is the context in which the applicant made his statements. The analysis of the applicant's case cannot be limited to one or more isolated passages from his article, but must take into account the overall thrust of the article (see, among other authorities, *Lewandowska-Malec v. Poland*, no. 39660/07, § 62, 18 September 2012).

76. With regard to the phrase "thieves in the administration of justice", the applicant left no doubt in his article that the person responsible for the theft of the hunting trophies was – in his view – M.K., a trainee bailiff. However, the trial court's position was that since a trainee bailiff was not a judge or a prosecutor nor an employee of the administration of justice then it was factually incorrect to assert that there were "thieves in the administration of justice". The Court is unpersuaded by such a restrictive interpretation of the term "administration of justice" in the present case. First, it notes that the actual charge against the applicant was related to defamation of "officials" (*pracowników*) of the Wrocław Regional Court and of the Wrocław-Krzyki District Court which term could well encompass not only judges and prosecutors but also other officials involved in the administration of justice, including administrative staff. It should be noted that in 1995, at the time of the alleged theft of hunting trophies, the status of court bailiffs was regulated by the Act on the Organisation of Courts. According to this Act, at the material time court bailiffs were employed in district courts by virtue of a nomination made by the President of the Regional Court. Trainee bailiffs completed their one-year long training under the supervision of a bailiff and then took a professional exam. Second, the Court already established that the administration of justice in the broader sense of this term includes also public prosecutors (see *Lešník v. Slovakia*, no. 35640/97, § 54, ECHR 2003-IV). Furthermore, the editor-in-chief of the newspaper explained that the administration of justice in the popular understanding comprised all persons employed in the justice system who were connected one way or the other with the observance and enforcement of the law (see paragraph 12 above). The applicant relied on such understanding of the term and the Court finds this position reasonable. It would be unduly formalistic to require that a journalist writing about the

functioning of the courts or the prosecutors should only use precise legal terms without making any allowance for the understanding of an average reader subject to the condition that a journalist acted in good faith and provided accurate and reliable information.

77. Next, the Court will scrutinise the phrase "mafia-like prosecutor-judge association". The applicant asserted that it was a value judgment and not a statement of fact as determined by the domestic courts. In assessing whether there was a "pressing social need" capable of justifying an interference with the exercise of freedom of expression, a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof (see *Lingens v. Austria*, 8 July 1986, § 46, Series A no. 103; *De Haes and Gijsels*, cited above, § 42). Even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (see *De Haes and Gijsels*, cited above, § 47; *Oberschlick v. Austria (no. 2)*, judgment of 1 July 1997, *Reports* 1997-IV, p. 1276, § 33; *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II; and *Lewandowska-Malec*, cited above, § 65).

78. The domestic courts categorised the phrase at issue as a statement of fact. The trial court held in a cursory manner that the fact of existence of a "mafia-like prosecutor-judge association" was not established as the court had found no evidence in support of it. The Court is unpersuaded by the above approach of the domestic courts. Firstly, it notes that the phrase at issue does not lend itself to a clear categorisation. In the Court's view the impugned phrase is something of a hybrid between a factual statement and a value judgment with a prevalence of the latter element. Secondly, it notes that the impugned phrase was used by bailiff H.J. in his complaint to the State Prosecutor and then relayed by the applicant who deemed it to be an opinion. Thirdly, the critical issue for the proportionality of the interference is the question of a factual basis for the impugned statement. The Court notes in this respect that the impugned statement was used by the applicant in connection with various procedures involving judges and prosecutors by which bailiff H.J. attempted to elucidate the circumstances concerning the alleged theft of his hunting trophies. The numerous irregularities which he identified in respect of those procedures constituted, in the Court's view, a sufficient factual basis for the impugned statement.

79. In addition, even if the phrase at issue seems harsh, the Court recalls that persons taking part in a public debate on a matter of general concern – like the applicant in the present case – are allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements (see, *Mamère v. France*, no. 12697/03, § 25, ECHR 2006-XIII; and *Dąbrowski v. Poland*, no. 18235/02, § 35,

19 December 2006). The phrase at issue remains within the acceptable limits being closely connected with factual information provided by the applicant in his article (compare and contrast, *Kania and Kittel v. Poland*, no. 35105/04, § 47, 21 June 2011). In this connection, the Court agrees with the domestic courts' position of the need to protect public confidence in the judiciary as confirmed in its own case-law and the case-law of the Polish Supreme Court. However, it does not find it established in the circumstances of the case that the use of the impugned expressions and the overall tone of the applicant's article, although undoubtedly critical, amounted to a destructive unjustified attack aimed at undermining the public confidence in the integrity of the judicial system as a whole (compare and contrast, *Prager and Oberschlick*, § 36; and *Kobenter and Standard Verlags GmbH*, § 31, both cited above). There is no doubt that in democratic society individuals and, *a fortiori*, journalists are entitled to comment on and criticise the administration of justice and the officials involved in it (see, *Lešník*, cited above, § 55). It should be noted that the trial court recognised that the case involved a conflict between the right to freedom of expression and the public interest in maintaining the authority of the judiciary. However, the balancing exercise carried out by the domestic courts did not take sufficiently into account all standards established in the Court's case-law under Article 10 of the Convention (compare and contrast, *Keller v. Hungary* (dec.), no. 33352/02, 4 April 2006; *Kwiecień v. Poland*, no. 51744/99, § 52, 9 January 2007).

80. With regard to the second count of defamation, the applicant was convicted of having wrongly imputed that prosecutor R.M. had mishandled the investigation against H.J. The former bailiff was suspected of embezzlement of PLN 370,000. In his article the applicant quoted a number of allegations made by H.J. against prosecutor R.M. He alleged that the prosecutor had remanded H.J. in custody for 2 years. Furthermore, he imputed that prosecutor R.M. had refused H.J.'s requests for evidence to be adduced, prevented his access to the case file, failed to carry out a confrontation between H.J. and M.K., refused H.J.'s access to a lawyer and added a forged document to the case file. The Court recalls that it may be necessary to protect civil servants, including public prosecutors from offensive, abusive and defamatory attacks which are likely to affect them in the performance of their duties and to damage public confidence in them and the office they hold (see *Janowski v. Poland* [GC], no. 25716/94, § 33, ECHR 1999-I; and *Lešník*, cited above, § 53). The extent to which such protection might be deemed necessary depends on the particular circumstances of the case.

81. The domestic courts held that the applicant had failed to prove the truthfulness of his allegations concerning prosecutor R.M. However, they did not establish factual circumstances related to many of the applicant's imputations against prosecutor R.M. In its reasoning, the trial court found,

inter alia, that "the bad faith of prosecutor R.M. who allegedly did not allow the accused's access to his lawyer has not been substantiated". In respect of the latter imputation, the trial court did not question its accuracy but went on to say that had it occurred then certainly a defence lawyer would have raised the matter in the course of the trial. By doing so, the court left unanswered a serious allegation that prosecutor R.M. had acted to the detriment of H.J. (see paragraph 22 above). Similarly, it found that even if the accused (H.J.) did not have access to the case file in the course of the investigation he could have had such access during the trial. Another example concerned the applicant's allegation that prosecutor R.M. had belatedly added a forged document to the case file and changed the numbering of pages. The trial court's response to this was that documentary evidence may be added by each party at any stage of the proceedings and that, in any event, the document at issue was not decisive for H.J. However, the point raised by the applicant was how an allegedly forged document exonerating M.K. could have been added to the file after the investigation had been closed. It is noteworthy that on this issue the applicant consulted another prosecutor who confirmed that the adding of relevant documents to the file after the investigation had been closed was inappropriate (see paragraph 9 above). The Court notes that this and other relevant factual issues were not elucidated by the domestic courts, which seem to have adopted a dismissive attitude to allegations relayed by the applicant. Nonetheless, they found that the applicant's allegations regarding prosecutor R.M. were not true.

82. Similarly, the trial court appeared to attach significant importance to the statement that prosecutor R.M. was "a colleague of the Wrocław judges, almost from behind a wall". It noted that an average reader would understand that a familiarity between judges and prosecutors was a factor influencing their decisions, while those decisions should be based on neutral grounds. The Court notes that the impugned phrase carries with it a certain negative connotation; however its objective impact may be assessed only against the background of the article taken as a whole. It notes that the relevant part of the article concerned exclusively the allegations against prosecutor R.M. and his alleged mishandling of the investigation against H.J. Even if the expression used by the applicant may appear unfortunate, it does not seem directly relevant to the imputation that the prosecutor R.M. mishandled the investigation. On the other hand, the applicant wrote in the article that trainee bailiff M.K. had forged H.J.'s signature but the prosecutor discontinued the investigation in this respect for lack of significant social danger. This fact was left unnoticed by the trial court.

With regard to the second count of defamation, the Court considers that, while certain of the allegations relayed by the applicant may appear too sweeping, overall there was a correlation between the seriousness of the

allegations and the applicant's imputation that prosecutor R.M. had mishandled the investigation.

83. It should also be noted that in 1998 H.J. filed a criminal complaint against prosecutor R.M., alleging that the latter had exceeded his authority in the investigation conducted against H.J. in 1995-1996. H.J.'s complaint concerned the allegations against prosecutor R.M. relayed by the applicant in his article. The investigation into the alleged excess of authority was carried out by the Wrocław-Stare Miasto District Prosecutor's Office. According to the applicant, the file of this investigation was lost and never fully reconstituted. Finally, nearly 7 years after the criminal complaint had been filed, on 2 March 2005, the District Prosecutor formally discontinued the investigation in respect of the excess of authority on the ground that prosecution of the offence had become time-barred. This decision did not contain any factual findings. The Court notes that as a result of a prolonged examination of H.J.'s complaint the allegations of misconduct of prosecutor R.M. have never been elucidated by the prosecuting authorities despite their certain seriousness.

84. The exercise of freedom of expression carries with it "duties and responsibilities" which also apply to the press. Consequently, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see, among other authorities, *Bladet Tromsø and Stensaas*, § 65; *Kasabova*, § 63, both cited above; and *Jucha and Żak v. Poland*, no. 19127/06, § 45, 23 October 2012). Indeed, in situations where on the one hand a statement of fact is made and insufficient evidence is adduced to prove it, and on the other the journalist is discussing an issue of genuine public interest, verifying whether the journalist has acted professionally and in good faith becomes paramount (see *Flux v. Moldova (no. 7)*, no. 25367/05, § 41, 24 November 2009; *Kasabova*, cited above, § 63 *in fine*; *Ziembiński v. Poland*, no. 46712/06, § 53, 24 July 2012; *Yordanova and Toshev*, cited above, § 55; and *Braun v. Poland*, no. 30162/10, § 50, 4 November 2014, not final).

85. The Court considers that this element was missing from the analysis of the applicant's case by the domestic courts. The domestic courts concentrated almost exclusively on the question of the truthfulness of the applicant's statements without analysing whether he had acted diligently in gathering and publishing the information. The lack of assessment of the applicant's diligence is particularly striking with regard to the second count of defamation. The applicant alleged that prosecutor R.M. had mishandled investigation against H.J. and provided a number of specific facts to support his allegation. Nonetheless, as discussed above, the domestic courts failed for the most part to determine the accuracy of the relevant facts and yet found that the allegations had been untrue. The failure of the domestic

courts to examine in detail the applicant's diligence and, in particular, the steps taken by him to ensure the accuracy of the published information falls short of the standard required by Article 10 of the Convention.

86. With regard to the other aspects of journalistic diligence, the Court considers that in the present case the applicant complied with those obligations. It is clear from the article that the applicant had extensive knowledge of the functioning of the judicial and prosecutorial authorities. He appears to have collected an important number of relevant documents, read a number of case files and talked to at least twenty-eight persons from the Wrocław courts and prosecution service. A number of these sources were disclosed in the article at issue. He invited the persons concerned to comment on the specific issues. Although H.J. was an important source of information, it does not seem that he was the only source on which the applicant relied. It should also be noted that the article at issue was a third publication concerning the same subject-matter and presented the story in a fairly balanced manner. On the whole, the applicant may be regarded to have acted as a diligent and responsible journalist.

87. Having regard to the foregoing, the Court considers that the standards applied by the Polish courts were not fully compatible with the principles embodied in Article 10 and that the domestic courts did not adduce "relevant and sufficient" reasons to justify the interference at issue. Having in mind that there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest, the Court finds that the interference was disproportionate to the aim pursued and was thus not "necessary in a democratic society".

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

89. The applicant also complained under Article 6 in conjunction with Article 10 of the Convention that the proceedings should have been conducted in public, having regard to their importance for the Wrocław justice system and the fact that they had concerned a journalist.

90. The Court considers that this complaint should be examined under Article 6 § 1 of the Convention alone.

91. It notes that the trial court held the proceedings against the applicant in private pursuant to Article 359 (2) of the Code of Criminal Procedure. This provision sets out a general rule that in cases concerning defamation or insult the public is excluded from the hearing unless the injured party asked for the hearing to be held in public. The trial court has no discretion in this respect.

92. The Court notes that the applicant's complaint is directed against Article 359 (2) of the Code of Criminal Procedure. In these circumstances it

finds that the applicant should have seized the Constitutional Court by means of a constitutional complaint. He could have challenged the compatibility of the impugned provision of the Code of Criminal Procedure with Article 45 §§ 1-2 of the Constitution (see, *Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003; *Pachla v. Poland* (dec.), no. 8812/02, 8 November 2005; *Urban v. Poland* (dec.), no. 29690/06, 7 September 2010 and *Hösl-Daum and Others v. Poland* (dec.), no. 10613/07, 7 October 2014). The latter provision provides similar guarantees to those of Article 6 § 1 of the Convention.

93. It follows that that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. Article 41 of the Convention provides:

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

A. Damage

95. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage for suffering and distress occasioned as a result of the violation of his freedom of expression. He submitted that the criminal proceedings against him had a serious impact on his professional and private life. The applicant was downgraded at his newspaper's office and was one of the first to be laid off in 2006.

96. The Government argued that the applicant had submitted his claim outside the time-limit (15 November 2010) stipulated by the Court in its letter to the applicant of 4 October 2010 and therefore in breach of Rules 38 § 1 and 60 § 2 of the Rules of Court. In consequence, they rejected the applicant's claim as non-existent. In support of their position, the Government referred to the judgment in the case of *Brezovec v. Croatia* (no. 13488/07, 29 March 2011) where the applicant did not submit a just satisfaction claim, nor did he resubmit the claims made in the application form within the time-limit fixed for submission of his Article 41 claims.

97. The Court notes that by letter of 4 October 2010 the applicant's then representative, Mr A. Rzepliński of the Helsinki Foundation of Human Rights in Warsaw, was invited to submit the applicant's observations on the case together with any claims for just satisfaction by 15 November 2010. The deadline was fixed by the President of the Section. Since no reply has been forthcoming, by letter of 15 March 2011 the Registrar of the Section informed the applicant's representative that the relevant time-limit has

expired. He also drew the representative's attention to Article 37 § 1 (a) of the Convention which provided for a possibility of striking the case out of the Court's list of cases in the absence of the applicant's intention to purse the application.

98. By letter of 22 March 2011 Mr A. Bodnar of the Helsinki Foundation of Human Rights informed the Registrar that he was appointed the applicant's new representative and that the applicant intended to purse his application. The new representative submitted that Mr A. Rzepliński left the Helsinki Foundation of Human Rights in January 2008. He explained that for this reason all correspondence addressed to Mr A. Rzepliński did not reach the Foundation and that they were not aware of any deadline for the submission of observations in the present case. The new representative asked for extension of the time-limit for submission of the applicant's observations until 6 April 2011. The applicant's second new representative was Ms D. Bychawska-Siniarska. Both new representatives requested authorisation from the President of the Section to act as the applicant's representatives under Rule 36 § 4 (a) of the Rules of Court. The President of the Section granted them leave to this effect on 4 May 2011.

99. By letter of 25 March 2011 Mr A. Bodnar was informed that the President of the Section has agreed to grant an extension of the time-limit until 6 April 2011. He was informed that the extended time-limit also applied to the submission of just satisfaction claims by the applicant. The Government was informed accordingly. On 6 April 2011 the applicant submitted his observations on the case together with his claims for just satisfaction.

100. The Court notes that the President of the Section granted the applicant's request for extension of the time-limit on the basis of discretion afforded to him under Rules 38 § 1 and 60 § 2 of the Rules of Court. The President had regard to the exceptional reasons put forward by the applicant's new representative for allowing an extension, notwithstanding the expiry of the deadline fixed for the applicant's initial representative. Having regard to the above, the Court finds that the applicant's claims for just satisfaction are valid since they were submitted within the time-limit extended by the President of the Section.

101. The Court accepts that the applicant suffered non-pecuniary damage – such as distress and frustration – which is not sufficiently compensated by the finding of a violation of the Convention. Having regard to the nature of the breach and making its assessment on an equitable basis, the Court awards the applicant EUR 5,000, plus any tax that may be chargeable, in respect of non-pecuniary damage.

B. Costs and expenses

102. The applicant made no claim in respect of costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 10 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 13 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Ineta Ziemele
Deputy Registrar	President