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

FOURTH SECTION

CASE OF DŁUGOŁĘCKI v. POLAND

(Application no. 23806/03)

JUDGMENT

STRASBOURG

24 February 2009

FINAL

24/05/2009

This judgment may be subject to editorial revision.

In the case of Długołęcki v. Poland,

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

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Mihai Poalelungi, *judges,*

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 3 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 23806/03) 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 Jacek Długołęcki ("the applicant"), on 11 July 2003.

2. The applicant was represented by Mr M. Puchalski, a lawyer practising in Gdynia. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged a breach of his right to freedom of expression guaranteed by Article 10 of the Convention.

4. On 5 September 2007 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1935 and lives in Gdańsk.

1. The article in Kolbudzkie ABC

6. The applicant is a journalist and at the material time was the editor in chief of a free newsletter called *Kolbudzkie ABC, Periodical, Private, Independent* (*Periodyk, Prywatny, Niezależny*). In the 13th edition of the newsletter, of 9 October 1998, the applicant published the following article:

> "The Peter Principle [the title is repeated six times]
>
> The Peter Principle: During his career in administration a civil servant aims to rise to a position in which he will be totally incompetent.
>
> Several years ago Mr A.W. took over and swiftly left the office of mayor. At that time this matter was widely commented upon. The surprise of the ABC editors was thus great when we saw the name of the former mayor of the commune (*wójt*) on the list of the candidates for the council (*radny*).
>
> This is not a candidate like any other, as he became famous for the scandal of disposing of the rights to an excellent water source in Pręgów, for half price, to the Gdańsk company Saur...
>
> We were shocked when we discovered the name of the unfortunate negotiator-forester on the list of candidates for the council. It can only mean that the failed would-be councillor thinks that the inhabitants of Kolbudy and the surrounding area have forgotten about the Saur blunder.
>
> This confirms the Peter Principle – the former mayor reached his level of incompetence a few years ago. That blunder (*wpadka*) did not put him off and he is crawling up (*wczołguje się)* again to another level... a Polish speciality...."

7. Mr A.W. was not elected in the municipal elections of 11 October 1998. However, he succeeded in the supplementary elections to the Municipal Council of 6 June 1999.

2. The prosecution on charges of defamation and insult

8. On 8 January 1999 Mr A.W. lodged with the Gdańsk District Court (*Sąd Rejonowy*) a private bill of indictment against the applicant, charging him with defamation. He submitted that, two days prior to the elections to the Municipal Council, the applicant had in his publication debased him in public opinion, which had undermined public confidence in him, as a consequence of which he had lost the election. In particular, A.W. complained about the applicant's allegations that he had sold the rights to

water sources for half price and the applicant's statement that as mayor of a commune he "had already reached his level of incompetence a few years ago, but that this blunder had not put him off and he was crawling up again to another level". Finally, A.W. considered that the title of the article, repeated several times, was defamatory.

9. On 4 April 2000 the Gdańsk District Court found the applicant guilty of defamation under Article 212 of the Criminal Code as well as of proffering insult under Article 216 of the Criminal Code. The applicant was sentenced to a fine of 1,000 Polish zlotys (PLN) and was ordered to pay PLN 200 to a charity. Furthermore, the applicant was ordered to reimburse the private prosecutor PLN 300 for the costs of the proceedings. The court found as follows:

> "In the court's opinion, both the form and the content of the article 'The Peter Principle' clearly show that [the applicant's] purpose was to defame the private prosecutor in alleging abuses when signing the contract with the Saur company, so that the day before the elections to the Kolbudy Municipal Council he would lose the public confidence necessary for him to hold public office".

10. On 16 August 2000 the applicant appealed against the judgment alleging, *inter alia*, a violation of Article 10 of the Convention.

11. On 30 January 2001 the Gdańsk Regional Court allowed the appeal, quashed the judgment and remitted the case.

12. On 10 December 2002 the Gdańsk District Court gave a judgment. The court acquitted the applicant of the charge of defamation under Article 212 of the Criminal Code. It found however that the applicant had insulted A.W. (*znieważenie*), within the meaning of Article 216 §§ 1 and 2 of the Criminal Code, in that he had stated in his article "The Peter Principle" that he "had already as mayor reached his level of incompetence a few years ago, but this blunder [had] not put him off and he [was] crawling up again to another level". The court, however, decided to conditionally discontinue the proceedings for a probationary period of one year, as it had established that the guilt and danger to society of the act committed by the applicant had not been significant. The applicant was ordered to publish an apology in *Kolbudzkie ABC*, to pay 50 Polish zlotys (PLN) [approximately 13 euros (EUR) at the material time] to a charity, to reimburse the private prosecutor PLN 300 for the costs of the proceedings and to pay the State Treasury PLN 118 for the costs of the proceedings.

13. The trial court, in acquitting the applicant of the charge of defamation, had referred to standards set by the Convention and the Court, underlining the importance of free speech in the context of elections and considering that the limits of acceptable criticism as regards a politician were wider. In particular the court took into account that criminal proceedings had been instituted against Mr A.W. in which he had been charged with mismanagement while selling the above-mentioned water source. Although Mr A.W. was acquitted in this set of proceedings, the

court considered that the applicant in his article had merely alleged his incompetence which had been within the limits of acceptable criticism.

14. With regard to the charge of proffering insult under Article 216 of the Criminal Code the trial court established as follows:

> "The statement about A.W., in the article 'The Peter Principle', that he '[had] as mayor reached his level of incompetence a few years ago, but this blunder [had] not put him off and he [was] crawling up again to another level' amount to proffering insult because the use of those words, particularly the word 'crawling' are undoubtedly pejorative and the fact of publishing those words in the newsletter *Kolbudzkie ABC* qualifies that act as an insult proffered through the mass media.
>
> At the same time the court has established... that this statement objectively violated the good name of the person against whom it was directed.
>
> ...
>
> There is thus no doubt that in the present case the conditions for the offence of proffering insult through the media, under Article 216 §§1 and 2 of the Criminal Code, have been fulfilled....
>
> ...against the background of the collected evidence, [the applicant] should be considered guilty... However, [while] the social danger of the act committed by [the applicant] is not significant, it is undoubtedly not unimportant (*znikoma)*. In the light of the above the court finds that the circumstances in which the applicant had committed the offence of insulting [Mr A.W.] in the newsletter *Kolbudzkie ABC* were established beyond any doubt. ...the court has thus decided to conditionally discontinue the proceedings for a probationary period of one year...
>
> The court also has regard to the fact that the insult related only to the public activity of the private prosecutor and it is commonly known that a person who undertakes such activity should be prepared to accept attacks against himself, relating to the assessment of his work or allegations made during an election campaign, more often than other people in society. At the same time, it is known that for the proper functioning of democracy it is necessary to secure the right to unrestrained criticism of actions taken by elected representatives.
>
> ...
>
> The [payment to the charity in the amount of PLN 50] is intended to cause real detriment to the accused, against whom the criminal proceedings have been conditionally discontinued. In setting the amount of the fine the court took into consideration the rather difficult financial situation of the accused and the insignificant danger to society of the offence attributed to him...."

15. Both the applicant and the private prosecutor lodged appeals against the judgment. The applicant maintained that he had not intended to insult the politician and that he had not been aware that his literary metaphor could be understood as an insult. His actions were motivated by the interest of the local community and he had acted within the boundaries of admissible criticism and freedom of press.

16. On 21 March 2003 the Gdańsk Regional Court dismissed the appeals and ordered the applicant to pay PLN 50 for the costs of the proceedings. The court held as follows:

> "...taking into account reading of the whole of [the applicant's] article, and in particular the negative and contemptuous-sounding expression "to crawl up to another level", there is no doubt as to the fact that we are dealing with an insult. ...
>
> According to the court [the applicant] wrongly interprets the boundaries of acceptable criticism. Insult or abusive language should by no means be included in the definition of criticism. Criticism consists of a negative or positive assessment of someone's action or attitude; it is however restricted to the purpose of denouncing negative attitudes. To reach this objective it is not necessary to use statements that insult the person in question and for this reason exceed the boundaries of acceptable criticism. The concept of acceptable criticism applies to the offence of defamation and only in so far as it concerns a charge raised against such person. To cover by this principle a statement that was not a charge against this person, but an expression of contempt and disrespect, would be against the [law]. All criticism should be limited by fairness and the above-mentioned purpose of public interest. In the present case these boundaries were overstepped and it was not necessary, for the purpose of the protection of a public interest, to commit an insult. To sum up, the applicant's action for the purpose of a socially justified interest could not influence [his] responsibility for acting in a debasing manner and, in consequence, for the insult committed by him..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. The relevant provisions of the 1997 Criminal Code provide as follows:

> "Article 212 § 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 this person, group or entity in public opinion 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 216 § 1. Anyone who insults another person in his presence, or, although in his absence, in public, or with the intention that the insult shall reach such a person, shall be subject to a fine or the penalty of restriction of liberty.
>
> § 2. Anyone who insults another person through the mass media shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.
>
> § 5. Prosecution takes place under a private bill of indictment."

18. Articles 66 et seq. of the 1997 Criminal Code concern the conditional discontinuation of criminal proceedings.

Article 66 reads, in so far as relevant:

> "§ 1. The court may conditionally discontinue the criminal proceedings if the guilt and social danger of the act are not significant and the circumstances of its commission do not raise doubts, and that the attitude of the perpetrator not previously punished for an intentional offence, his personal characteristics and his way of life to date provide reasonable grounds for the assumption that, even in the event of the discontinuance of the proceedings, he will observe the legal order and in particular will not commit an offence."

19. A more detailed rendition of the relevant domestic law provisions concerning conditional discontinuation of the proceedings is set out in the Court's judgment *Dąbrowski v. Poland*, no. 18235/02, §§ 14-16, 19 December 2006.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

20. The applicant complained of a breach of 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

21. The Government submitted that the applicant had not exhausted all domestic remedies as required by Article 35 § 1 of the Convention. In particular, the applicant could have availed himself of the opportunity of lodging a constitutional complaint with the Constitutional Court. They relied on a previous case in which the Court had recognised the constitutional complaint as an effective remedy (see *Szott-Medyńska*

v. Poland (dec.), no. 47414/99, 9 October 2003). The Government referred to the Constitutional Court's judgment of 11 October 2006 which concerned the constitutionality of Article 226 § 1 of the Criminal Code, which penalises insulting a public official.

22. The applicant disagreed with the Government. He submitted that the constitutional complaint was not an effective remedy within the meaning of Article 35 § 1 of the Convention. The applicant claimed that he had appealed against the Regional Court's judgment by which he had exhausted available domestic remedies.

23. The Court reiterates that the object of the rule on exhaustion of domestic remedies is to allow the national authorities (primarily the judicial authorities) to address an allegation of a violation of a Convention right and, where appropriate, to afford redress before that allegation is submitted to the Court (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI). The Court further reiterates that Article 35 of the Convention, which sets out the rule on exhaustion of domestic remedies, provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V, and *Mifsud v. France* (dec.), no. 57220/00, § 15, ECHR 2002-VIII).

24. The Court has also held that the constitutional complaint in Poland could be recognised as an effective remedy, within the meaning of the Convention, only where: 1) the individual decision, which allegedly violated the Convention, had been adopted in direct application of an unconstitutional provision of national legislation; and 2) procedural regulations applicable to the revision of such type of individual decisions provided for the reopening of the case or the quashing of the final decision in consequence of the judgment of the Constitutional Court in which unconstitutionality had been found (see *Pachla v. Poland* (dec), no. 8812/02, 8 November 2005, and *Szott-Medynska,* cited above).

25. Turning to the circumstances of the instant case, the Court notes that the applicant was found guilty of proffering insult in breach of Article 216 of the Criminal Code. This article prohibits proffering insults to another person through mass media and is not concerned with the special situation of insulting a public figure. The applicant's sanction was thus a result of judicial interpretation which applied this provision to the particular circumstances of the applicant's case. In this connection the Court points to the established jurisprudence of the Constitutional Court which provided that constitutional complaints based solely on the allegedly wrongful interpretation of a legal provision were excluded from its jurisdiction (see *Palusinski v. Poland* (dec.), no. 62414/00, ECHR 2006-...).

Therefore the Court considers that the constitutional complaint cannot be regarded with a sufficient degree of certainty as an effective remedy in the applicant's case.

For these reasons, the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

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

B. Merits

1. Arguments of the parties

27. The applicant submitted that the interference with his right to freedom of expression was not necessary in a democratic society as it was not justified by a pressing social need. He emphasised that the language used by him had not overstepped the boundaries of admissible and civilised journalistic expression of criticism. The statements in question were not offensive and were not an intentional personal assault on that politician. The applicant's intention was to highlight that politician's incompetence in the context of upcoming local elections. Moreover, the statements were quoted after a well-known book by Laurence J. Peter, which could not be considered offensive.

28. The applicant argued that his statements should be put in the context of freedom of press in the democratic society and taking into account his obligations as a journalist to report on incompetency of a politician. His article concerned matters of public interest, particularly since it was published during the election campaign. Thus the politician should have shown more tolerance when facing criticism.

29. The applicant concluded that the authorities had overstepped the margin of appreciation afforded to them. Moreover, in the field of freedom of press the authorities should not have resorted to criminal proceedings as a criminal sentence carries various negative consequences for a person involved. The applicant considered it irrelevant that the domestic courts had conditionally discontinued the proceedings and had imposed a lenient penalty. It was important that they found that the applicant had committed the offence of proffering insult and that judicial decision entered the National Crime Register. In consequence of the institution of the criminal proceedings against him he had decided to stop publishing his newsletter. Thus, his right to freedom of expression had been violated.

30. The Government admitted that the penalty imposed on the applicant had amounted to an "interference" with his right to freedom of expression. However, they pointed to the fact that the applicant had been acquitted of

the charge of defamation and the proceedings in his case had been discontinued. The Government also submitted that the interference was "prescribed by law" and pursued a legitimate aim as it was intended to protect the reputation and rights of others.

31. Furthermore, the Government pointed out that the freedom of the press was not absolute and that the domestic authorities had not overstepped their margin of appreciation in balancing two competing interests. They submitted that the domestic courts had found that the statements made by the applicant had not been a critical opinion aimed at a politician but an insult. The Government underlined that while the limits of acceptable criticism are wider as regards a politician, the latter should also receive protection.

32. The Government also submitted that the domestic courts in making their assessment had adduced detailed reasons that had been in accordance with the Convention standards. In particular they took into consideration the Court's case-law as regards the value of a public debate, the crucial importance of political debate in the context of free elections, and the wider limits of acceptable criticism applicable to a politician.

33. The Government concluded that the interference complained of had been proportionate to the legitimate aim pursued and thus necessary in a democratic society to protect the reputation of others. The penalty, a symbolic payment to a charity and an order to apologise to A.W., was a lenient one and did not constitute a conviction. Although a notice of the proceedings against the applicant is revealed in the National Crime Record, the information is removed after a successful expiry of the probation period. They submitted that there had been no violation of Article 10 of the Convention.

2. The Court's assessment

(a) General principles

34. The Court reiterates that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, among many other authorities, *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, § 57, and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

35. The limits of critical comment are wider if a public figure is involved, as he inevitably and knowingly exposes himself to public scrutiny

and must therefore display a particularly high degree of tolerance (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 42; *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1567, § 54; and *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 30, ECHR 2003-XI).

36. Although freedom of expression may be subject to exceptions they "must be narrowly interpreted" and "the necessity for any restrictions must be convincingly established" (see *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216).

37. There is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV). In the context of a public debate the role of the press as a public watchdog allows journalists to have recourse to a certain degree of exaggeration, provocation or harshness. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders (see *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, § 43). It is true that, whilst an individual taking part in a public debate on a matter of general concern is required not to overstep certain limits as regards – in particular – respect for the reputation and rights of others, he or she is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements (see *Kuliś v. Poland*, no. 15601/02, § 47, 18 March 2008).

38. One factor of particular importance is the distinction between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. A requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. However, 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 may be excessive where there is no factual basis to support it (see *Turhan v. Turkey*, no. 48176/99, § 24, 19 May 2005, and *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II).

39. The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *Vogt v. Germany*, judgment of 26 September 1995,

Series A no. 323, pp. 25-26, § 52, and *Jerusalem v. Austria*, cited above, § 33 and *Feldek v. Slovakia*, no. 29032/95, §§ 77 and 78, ECHR 2001-VIII).).

40. Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system (see *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, p. 22, § 47). The two rights are inter-related and operate to reinforce each other. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely (see, *Bowman v. the United Kingdom*, judgment of 19 February 1998, *Reports* 1998-I, § 42). This principle applies equally to national and local elections (see *Kwiecień v. Poland*, no. 51744/99, § 48, ECHR 2007-...).

(b) Application of the general principles to the present case

41. The Court observes that it is undisputed that the domestic courts' decisions complained of by the applicant amounted to an "interference" with the exercise of his right to freedom of expression. The Court also finds, and the parties agreed on this point, that the interference complained of was prescribed by law, namely Article 216 §§ 1 and 2 of the Criminal Code, and was intended to pursue a legitimate aim referred to in Article 10 § 2 of the Convention, namely to protect "the reputation or rights of others". Thus the only point at issue is whether the interference was "necessary in a democratic society" to achieve such aims.

42. The applicant, who was a journalist, had published, two days prior to municipal elections, an article concerning a local politician, a candidate for these elections and the former mayor of the commune. The domestic courts in the criminal proceedings instituted against the applicant upon an application lodged by that politician considered that the statement that "as mayor [A.W.] reached his level of incompetence a few years ago, but this blunder [had] not put him off and he [was] crawling up again to another level" amounted to proffering insult contrary to the Criminal Code.

At the same time the domestic court acquitted the applicant of defamation in particular as regards the statements in which the applicant alleged that Mr A.W. as a mayor had been guilty of mismanagement when selling a water source to a private company. The court considered that this allegation had been sufficiently confirmed by the facts as to fall within the scope of permissible criticism and the freedom of press.

The Court also notes that the impugned article 'The Peter Principle' was based on a theory developed in a 1968 book by Laurence J. Peter, which expounds the principle of hierarchiology, namely "in a hierarchy every individual tends to rise to his level of incompetence."

Finally, the Court observes that the applicant expressed his opinion in an eight-page-long free newsletter, self-edited and distributed, which was

addressed to the inhabitants of Kolbudy commune. Its range and impact were thus very limited.

43. In the light of the above the Court considers that the impugned statement should be considered a value judgment on a matter of public interest which cannot be said to have been devoid of any factual basis. The Court is of the opinion that the content and the tone of the article were on the whole fairly balanced.

44. As regards the reasons given by the domestic courts, the Court firstly notes that when acquitting the applicant of the charge of defamation the court considered that his statements were within the limits of acceptable criticism of a politician in the context of political debate (see paragraph 13 above). For instance, the domestic courts acknowledged that his allegations that the politician, as mayor of the commune, was incompetent, had a sufficient factual basis. However, when establishing that the applicant had insulted the politician by stating that he was crawling up to another level of incompetence, the domestic courts failed to take into consideration that the impugned statement was a value judgment on a matter of public interest. The domestic court adopted a narrow definition of what could be considered acceptable criticism, excluding from it all statements expressing "contempt and disrespect" (see paragraph 16 above). In doing so the court did not take into consideration the fact that the impugned statements had been made in the context of a heated political debate. Moreover, it failed to notice that the applicant was exercising his right to impart information and ideas on political questions and on other matters of public interest and in so doing might have recourse to a degree of exaggeration. The statements in question were limited to an assessment of the professional sphere of the life of Mr A.W. and denounced his alleged lack of ability as a politician. The Court notes that although political invective often spills over into the personal sphere, in the instant case the applicant's critical comment did not concern the private or family life of that politician (see *a contrario Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 34, ECHR 2000-X, and *Kulis,* cited above, § 52).

Consequently, the Court finds that the domestic authorities failed to take into consideration the crucial importance of free political debate in a democratic society particularly in the context of free elections (see *Malisiewicz-Gąsior v. Poland*, no. 43797/98, § 67, 6 April 2006). Regard being had to the nature of the statements, and the fact that they had been made in the context of local elections, the Court is of the opinion that the reasons adduced by the domestic courts cannot be regarded as relevant and sufficient to justify the interference at issue.

45. Lastly, the Court reiterates that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference (see, for example, *Sürek v. Turkey (no. 1)* [GC], cited above, § 64, and *Chauvy and Others v. France*, no. 64915/01,

§ 78, ECHR 2004-VI). In that connection, it notes that while the penalty imposed on the applicant was relatively light (a payment of PLN 50 to a charity and reimbursement of the costs of the proceedings which amounted in total to PLN 518 – approximately 120 euros (EUR) at the material time), and although the proceedings against him were conditionally discontinued, nevertheless the domestic courts found that the applicant had committed a criminal offence of proffering insult. In consequence, the applicant had a criminal record. Moreover, it remained open to the courts to resume the proceedings at any time during the period of his probation should any of the circumstances defined by law so justify (see *Dąbrowski v. Poland*, no. 18235/02, § 36, 19 December 2006, and *Weigt v Poland* (dec.), 74232/01, 11 October 2005).

46. Furthermore, while the penalty did not prevent the applicant from expressing himself, it nonetheless amounted to a kind of censorship which was likely to discourage him from making criticisms of that kind again in the future. Such a conviction is likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, it is liable to hamper the press in the performance of its task of purveyor of information and public watchdog (see, *mutatis mutandis*, *Barthold v. Germany*, judgment of 25 March 1985, Series A no. 90, p. 26, § 58, and *Lingens v. Austria*, cited above, p. 27, § 44). Indeed, the applicant submitted that because of the criminal proceedings instituted against him, he had abandoned his journalistic activity.

47. Finally, the Court notes that the criminal proceedings in the present case had their origin in a bill of indictment lodged by the politician himself and not by a public prosecutor (see, *a contrario*, *Raichinov v. Bulgaria*, no. 47579/99, § 50, 20 April 2006) and that they resulted in conditional discontinuation of these proceedings. In view of the margin of appreciation left to Contracting States a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 59, ECHR 2007-..., *Radio France and Others v. France*, no. 53984/00, § 40, ECHR 2004-II and *Rumyana Ivanova v. Bulgaria*, no. 36207/03, § 68, 14 February 2008). Nevertheless, the Court notes that when a statement, whether qualified as defamatory or insulting by the domestic authorities, is made in the context of a public debate, the bringing of criminal proceedings against the maker of the statement entails the risk that a prison sentence might be imposed. In this connection, the Court recalls that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 only in exceptional circumstances, notably where other fundamental rights have been impaired, as for example, in the case of hate speech or incitement to violence (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 115, ECHR 2004-XI). For the Court, similar

considerations should apply to insults expressed in connection with a public debate**.** The Court would further observe that the Parliamentary Assembly of the Council of Europe in its Resolution 1577 (2007) urged those member States which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them without delay (Resolution *Towards decriminalisation of defamation* adopted on 4 October 2007).

48. Having regard to the above considerations, the interference in the applicant's case was disproportionate to the legitimate aim pursued, having regard in particular to the interest of a democratic society in ensuring and maintaining the freedom of the press in the context of free elections.There has therefore been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. The applicant claimed EUR 20,000 in respect of non-pecuniary damage.

51. The Government submitted that the claim was excessive.

52. The Court accepts that the applicant has suffered non-pecuniary damage – such as distress and frustration resulting from the proceedings against him and the adverse judgments – which is not sufficiently compensated by the finding of violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 3,000 under this head.

B. Costs and expenses

53. The applicant, who was represented by a lawyer, did not claim reimbursement of any costs and expenses incurred before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

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 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Polish zlotys at the rate applicable at the date of settlement;
   (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 24 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	Nicolas Bratza
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge Bratza is annexed to this judgment.

N.B.
T.L.E.

CONCURRING OPINION OF JUDGE BRATZA

1. I am in full agreement with the other members of the Chamber that the applicant's rights under Article 10 of the Convention were violated in the present case and only wish to add a few remarks of my own on the question of the use of the criminal law to punish journalists in respect of personal insults.

2. In paragraph 47 of the judgment it is noted that the Court has previously held that the use of a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued. This is, of course correct, although it is also correct that, in holding an interference with freedom of expression to have been disproportionate, the Court has frequently placed emphasis on the fact that recourse could have been had to means other than criminal sanctions (see, for example, *Lehideux and Isorni v. France*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, §§ 51 and 57; *Raichinov v. Bulgaria*, no. 47579/99, § 50, 20 April 2006). The Chamber goes on in the same paragraph to hold that when a statement, whether qualified as defamatory or insulting by the domestic authorities, is made in the context of a public debate, the bringing of criminal proceedings against the maker of the statement "entails the risk that a prison sentence might be imposed" and that the imposition of a prison sentence for a press offence would be compatible with journalists' freedom of expression as guaranteed by Article 10 only in exceptional circumstances.

3. In appearing to tie the lack of proportionality of the use of criminal sanctions for personal insult to a case where a journalist risks the imposition of a prison sentence, this statement of principle does not in my view go far enough. Irrespective of the severity of the penalty which is liable to be imposed on the journalist, the use of the criminal law, with the attendant risk of a criminal conviction and a criminal penalty, for criticising a politician or other public figure in a manner which can be regarded as personally insulting, is likely to deter a journalist from contributing to public discussion of issues affecting the life of the community and, more generally, to hamper the press in carrying out its important role as a public watchdog. In cases such as the present, involving criticism of a politician in the course of a public debate, it would in my view only be in the most exceptional circumstances that recourse to criminal proceedings against a journalist for alleged insult would be considered as a proportionate response, whether those proceedings originated in a bill of indictment lodged by a public prosecutor or, as in the present case, by the politician himself. The facts of the present case disclose no such exceptional circumstances.