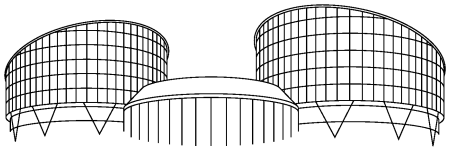

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FISRST SECTION

CASE OF KOŚĆ v. POLAND

(Application no. 34598/12)

JUDGMENT

STRASBOURG

1 June 2017

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

In the case of Kość v. Poland,

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

Linos-Alexandre Sicilianos, *President,*
Aleš Pejchal,
Krzysztof Wojtyczek,
Ksenija Turković,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski, *judges,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 9 May 2017,

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

PROCEDURE

1. The case originated in an application (no. 34598/12) 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 Jarosław Kość ("the applicant"), on 28 May 2012.

2. The applicant was represented by Ms B. Namysłowska-Gabrysiak, a lawyer practising in Warsaw. The Polish Government ("the Government") were represented by their Agent, Ms J. Chrzanowska of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that his right to freedom of expression had been violated.

4. On 19 January 2015 the complaint concerning Article 10 of the Convention was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1942 and lives in Tomaszów Mazowiecki.

6. On 29 September 2010 at a village meeting in Jadwigów, fifteen residents voted in favour of holding the previous local mayor (s*ołtys*) Z.M.

to account for his management of public funds. They appointed the applicant to be in charge of further action in that regard.

7. On 7 October 2010 the applicant sent a document to the mayor of the Tomaszów Mazowiecki District (*Starosta Powiatowy* - "the district mayor") entitled "Petition" (*Wniosek* - "the document"), which was signed by the applicant and three other residents of Jadwigów who confirmed their agreement with the petition.

8. The text read as follows:

> "On 27 September in the village of Jadwigów a legally valid village meeting took place, during which residents of the village decided by a large majority to appoint me to be in charge of investigating the concerns detailed below. It took me over one week to figure out a solution to this problem. I came to the realisation that the best way to approach [it] would be to file a request with the Mayor of the District in order to clarify the issue, even though I had already informed the current local mayor and Mayor of the Tomaszów Mazowiecki Commune (*wójt*) of the allegations.
>
> The facts and circumstances are as follows.
>
> The local mayor of Jadwigów, Z.M., whose term in office was concluded on the election of the current local mayor, Ms J. G., received grants for the benefit of the village from the Commune and accepted payments from the lease of the village shop.
>
> During his term in office, he never asked the residents or the local council for what purpose the money should be used. He managed the funds arbitrarily and, I think, used them for building works, namely the renovation of the community hall (*świetlica – dom ludowy*).
>
> However, he never shared the accounts with the residents of the village; in particular how much money there was and what it was spent on.
>
> There are many rumours going around the village, which out of respect for your office I will not be repeating. I will only add one more thing, namely that the community hall was not accessible to the residents and their children for [ten] years.
>
> I consider, therefore, that the petition and the request are both valid.
>
> [signatures of three residents]
>
> I, other signatories of this request for a petition and all the residents believe that, thanks to the Mayor of the District, they will receive a full and plausible explanation of the facts described above."

9. The document was sent to the district mayor before local elections which took place on 21 November 2010 (*wybory samorządowe*). Both the applicant and Z.M. were candidates in those elections but neither of them became a local councillor.

10. On an unspecified date the Tomaszów Mazowiecki Commune Council Audit Committee analysed the document. It decided, as summarised by the domestic court, "that there were no grounds to allege that somebody had mismanaged the funds."

11. On 14 December 2010 Z.M. lodged a civil action with the Piotrków Trybunalski Regional Court ("the Regional Court") against the applicant for infringement of his personal rights. He requested that the court order the applicant to publish an apology in the local weekly newspaper and pay 4,000 Polish zlotys (PLN) to the Voluntary Fire Brigade (*Ochotnicza Straż Pożarna* – "the VFB").

12. On 31 May 2011 the Regional Court decided that the applicant had violated Z.M.'s personal rights and ordered that he send a statement by post to the district mayor, the Tomaszów Mazowiecki Commune Office (*Urząd Gminy w Tomaszowie Mazowieckim*) and Z.M. stating:

> "I, Jarsosław Kość, apologise to [Z.M.] for violating his reputation by forwarding to the Mayor of Tomaszów District a document on [7 October] 2010 entitled "Petition", which contained false allegations that the local mayor, Z.M., arbitrarily managed funds for the benefit of the village; that he took, as local mayor, the payments under the lease of the village shop; and a statement that the community hall had not been available to the residents for the past [ten] years."

13. In the course of the proceedings the court examined a statement made at the village meeting on 10 February 2011 at which six residents of Jadwigów confirmed that they had all been instigators of the enquiry in October 2010 which had resulted in the applicant's document to the district mayor. The residents explained that their intention had been to clarify the questions raised, given Z.M.'s involvement in matters such as the community hall refurbishment and running of the VFB.

14. The court considered that the applicant's letter from 7 October 2010 contained false information, which supported the finding of a violation of Z.M's personal rights. This included statements claiming that Z.M., acting in his capacity as local mayor, had taken rent from the lease of the village shop. The domestic court established that even if Z.M. had taken any payments, he had done so as chairman of the VFB. The court also found that the village shop was located in the building owned by the VFB, which also hosted the community hall, and that the rent under the lease was paid to the VFB through an intermediary, its treasurer. Z.M., as chairman of the VFB, merely set the amount of rent to be paid each year. The court also found that during Z.M.'s time in office, the community hall had been open for public use; in that respect it dismissed the testimony of some witnesses stating the opposite. At the time, there were also building works being carried out in the same building. It was established that nobody, and this included Z.M., had received any money in cash for the work. It was also established that the village had not received any funds directly from the commune. The commune had paid the costs of the renovations of the VFB's building.

15. The court considered that since the applicant had failed to prove the veracity of his accusations and, given their adverse effect, this amounted to a violation of Z.M.'s personal rights.

16. On 12 July 2011 the applicant lodged an appeal with the Łódź Court of Appeal, alleging that the court had not considered that the relevant text had been communicated in the public interest.

17. On 4 November 2011 the Łódź Court of Appeal dismissed the applicant's appeal, emphasising that the publishing of false information would result in a violation of a person's personal rights. It rejected the applicant's claim that the petition was merely an expression of doubt concerning the lawfulness of Z.M.'s actions when he was local mayor. The court considered that the timing of the applicant's actions proved that they had not served the public interest and had been motivated by his desire to win the elections. He had raised his concerns almost three years after the end of Z.M.'s mandate during the electoral campaign which Z.M. had lost. The applicant received a copy of the judgment on 15 December 2011.

18. On 1 March 2012 the Regional Court issued a writ of enforcement in respect of its final judgment of 31 May 2011. The applicant instituted proceedings to have the enforcement order quashed on the grounds that he had a case pending before the European Court of Human Rights. On 21 September 2012 the Piotrków Trybunalski Regional Court dismissed his claim. On 18 October 2012 the applicant lodged an appeal against the latter judgment. On 7 November 2013 it was dismissed by the Piotrków Trybunalski Court of Appeal.

19. On 21 January 2011 the applicant was elected mayor of Jadwigów.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant constitutional provisions

20. Article 14 of the Constitution provides as follows:

> "The Republic of Poland shall ensure freedom of the press and other means of social communication."

21. 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."

22. 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 administrative provisions

23. Article 222 of the Code of Administrative Procedure (*Kodeks postępowania administracyjnego*) provides the criteria for classifying a text as either a complaint or a petition:

> "The deciding factor in determining whether a text is a complaint (*skarga*) or a petition (*wniosek*) is the substance of the text and not its form."

C. Civil Code

24. Article 23 of the Civil Code contains a non-exhaustive list of "personal rights" (*dobra osobiste*). It states:

> "The personal rights of an individual, such as, in particular, health, liberty, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific or artistic work, [as well as] inventions and improvements, shall be protected by the civil law regardless of the protection laid down in other legal provisions."

25. Article 24 § 1 of the Civil Code provides:

> "A person whose personal rights are at risk [of infringement] by a third party may seek an injunction, unless the activity [complained of] is not unlawful. In the event of infringement [the person concerned] may also require the party who caused the infringement to take the necessary steps to remove the consequences of the infringement... In compliance with the principles of this Code [the person concerned] may also seek pecuniary compensation or may ask the court to award an adequate sum for the benefit of a specific public interest."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant complained of a breach of his right to freedom of expression. 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

27. The Court notes that the application 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 parties' submissions

28. The applicant submitted that the State's interference with his right had not been proportionate. He firstly stressed the private nature of the petition, which should have been regarded as his private correspondence with local government officials as there had been no intention to make it public. Secondly, the statements made in the petition had in fact been value judgments and not statements of facts. They had concerned the proper use of public funds, which had undoubtedly been a matter of general interest to the local community. In cases like this, where an applicant engaged in a debate of public interest, there should be little scope under the Convention for restrictions on speech.

29. The applicant also argued that the authorities had not taken into account the principles of the Convention when deciding the case. Firstly, the importance of freedom of expression in the process of democratic elections had not been given due consideration. Secondly, the courts had failed to notice that both parties were politicians, whose reputation and good name should be given lesser protection.

30. The Government considered that the interference with the applicant's right to freedom of expression had been "prescribed by law" and pursued a legitimate aim as it had been intended to protect the reputation and rights of others. They submitted that there had been no violation of Article 10 of the Convention.

31. They pointed out that the domestic courts had found the applicant's allegations untrue and defamatory. They submitted that his real aim had been to deprive the plaintiff of his good name and reputation. He therefore could not be considered to have acted in good faith and in the public interest. The Government noticed that the applicant had made his unfounded

allegations against the plaintiff more than four years after his term of office had ended and in the context of elections in which he had also participated.

32. They submitted that the domestic courts had given relevant and sufficient grounds for their decisions. In the civil proceedings instituted by M.Z., the courts ordered the applicant to publish an apology but not to pay any compensation to the injured party. The sanction had thus been very mild and not disproportionate to the aim pursued.

2. The Court's assessment

33. The Court notes that it is undisputed that the civil proceedings against the applicant amounted to an "interference" with the exercise of his right to freedom of expression. The parties agreed that the interference complained of had been prescribed by law, namely Articles 23 and 24 of the Civil Code, and had been intended to pursue a legitimate aim referred to in Article 10 § 2 of the Convention, namely to protect "the reputation or rights of others". The only point at issue is therefore whether the interference was "necessary in a democratic society" to achieve that aim.

(a) General principles

34. The test of whether an interference was "necessary in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V, and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII).

35. There is little scope under Article 10 § 2 of the Convention for restrictions on political speech or debate on questions of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV, and *Bédat v. Switzerland* [GC], no. 56925/08, § 46, ECHR 2016). Moreover, the limits of acceptable criticism are wider in respect of politicians than private individuals. Unlike the latter, the former inevitably and knowingly lay themselves open to close scrutiny of every word and deed by journalists and the public at large, and they must consequently display a greater degree of tolerance (see *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103, and *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 30, ECHR 2003-XI).

36. 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 were made, a right which, as an aspect of private life, is protected by Article 8 of the Convention. The Court has already defined its own role in balancing these two conflicting interests. It identified a number of relevant criteria where the right to freedom of expression is being balanced against the right to respect for private life (see, among other authorities, *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 83 to 93, ECHR 2015 (extracts), *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 89-95, 7 February 2012, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 109-113, ECHR 2012). The three criteria particularly pertinent in the present case, which the Court will revert to below, are:

(i) contribution to a debate of general interest;

(ii) how well-known is the person concerned and what is the subject of the report; and

(iii) method of obtaining the information and its veracity.

37. In sum, 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, in the light of the case as a whole, the decisions they have taken pursuant to their discretionary powers (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I, and *Dalban v. Romania* [GC], no. 28114/95, § 47, ECHR 1999-VI).

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

38. The Court notes that the applicant was the author of a document entitled "Petition", which was sent to the district mayor in the period directly preceding some local elections. The document was signed by three other residents and was the result of a village meeting at which various issues were discussed by fifteen inhabitants; in particular, the need to clarify the nature of the involvement of Z.M., at that time the local mayor, in the management of funds for the benefit of the village (see paragraphs 6 and 8 above). It thus clearly originated from a public debate on important issues for the local community (see *Mika v. Greece*, no. 10347/10, § 35, 19 December 2013). The Court reiterates that in respect of matters of public interest, restrictions on freedom of expression should be interpreted narrowly (see *Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 33, ECHR 2000-X).

39. The Court agrees with the applicant that the overall purpose of the document had been to ask for clarification and information. In particular the applicant sought to receive information on the way in which public funds had been spent. The statements used by the applicant were formulated as questions and concerns to which he expected to obtain answers (see paragraph 8 above). The domestic courts failed to consider the particularity of the small village, clearly demonstrated in the proceedings, where the same person acted in two different capacities both crucial to the local community, that of local mayor and chairman of the VFB. For instance, the domestic courts agreed that the lease payments might have been accepted by the claimant in his capacity as chairman of the VFB, which owned the premises. They established that the claimant, in the same capacity, had negotiated the amount of rent payable under the lease of the shop. Moreover, although no grants were received by the village itself, the VFB received them in the form of amounts covering the costs of refurbishment of its premises, which included the village shop and community hall (see paragraph 14 above).

40. Furthermore, in order to assess the justification of a statement, a distinction needs to be made between statements of fact and value judgments in that, while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The 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 (see, for example, *Lingens*, cited above, § 46). The classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 36, Series A no. 313). However, in the present case the domestic courts failed to make a clear distinction and clarify whether the impugned statements had been value judgments or statements of facts.

41. Having regard to the above, the Court considers that the applicant's petition was not a gratuitous personal attack on Z.M. and that the issues voiced by the applicant were minor and not devoid of factual basis.

42. The Court notes that the statements in question were made in a letter addressed to the district mayor and that there had been no intention or attempt to make it public (see *Grigoriades v. Greece*, 25 November 1997, § 47, *Reports of Judgments and Decisions* 1997-VII). The applicant alleged mainly a lack of consultation with the inhabitants and insufficient information. The document served some purpose as the applicant obtained a reply to his concerns from an audit committee, albeit sometime later (see paragraph 10 above). In the circumstances of the case the applicant should not have been stopped from having his concerns communicated to the authorities. Moreover, it is difficult to see how such statements made in a

non-published letter to a public authority could have affected Z.M.'s reputation.

43. Both the applicant and the offended party, the former local mayor, Z.M., were public figures, candidates in the local elections to the commune council. The Court reiterates that the limits of acceptable criticism were thus wider for Z.M. acting in his public capacity than in relation to a private individual (see *Jerusalem v. Austria*, no. 26958/95, § 38, ECHR 2001-II, and *I Avgi Publishing and Press Agency S.A. and Karis v. Greece*, no. 15909/06, § 34, 5 June 2008).

44. However, the domestic courts confined themselves to requiring the applicant to prove the veracity of his statements without giving any consideration to any of the above elements. They found that he had failed to prove the veracity of his accusation which amounted to a violation of Z.M.'s personal rights (see paragraph 15 above). Also, the second-instance court examined whether the applicant had acted in the public interest and concluded that he had not because he had made his criticisms during the local election campaign, three years after Z.M.'s term as local mayor had ended (see paragraph 17 above).

45. Conversely, the Court considers that opinions and information pertinent to elections, both local and national, which are disseminated during an electoral campaign should be considered as forming part of a debate on questions of public interest, unless proof to the contrary is offered (see *Kwiecień v. Poland*, no. 51744/99, § 51, 9 January 2007). The Court reiterates in this connection that 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*, 2 March 1987, § 47, Series A no. 113, *Andrushko v. Russia*, no. 4260/04, § 41, 14 October 2010, and *Athanasios Makris v. Greece*, no. 55135/10, § 36, 9 March 2017). The two rights are interrelated 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*, 19 February 1998, § 42, *Reports* 1998-I).

46. Having regard to the foregoing, the Court finds that the interference with the applicant's exercise of his freedom of expression was not supported by relevant and sufficient reasons in terms of Article 10 and was disproportionate to the legitimate aim of protecting Z.M.'s reputation. This conclusion is unaffected by the relatively lenient nature of the sanction imposed on the applicant.

There has thus been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

49. The Government contested this claim as excessive.

50. The Court awards the applicant EUR 3,000 under this head.

B. Costs and expenses

51. The applicant also claimed EUR 1,500 for the costs and expenses incurred before the Court, corresponding to thirty hours of work at a rate of EUR 50 per hour.

52. The Government contested the claim.

53. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the claimed sum in full.

C. Default interest

54. 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 concerning Article 10 of the Convention 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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 1 June 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Registrar	Linos-Alexandre Sicilianos President