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

FOURTH SECTION

CASE OF FRANKOWICZ v. POLAND

(Application no. 53025/99)

JUDGMENT

STRASBOURG

16 December 2008

FINAL

04/05/2009

This judgment may be subject to editorial revision.

In the case of Frankowicz 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 25 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 53025/99) 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 Ryszard Frankowicz ("the applicant"), on 22 January 1999.

2. The Polish Government were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that the disciplinary proceedings against him had been unfair in violation of Article 6 of the Convention and that there had been an interference with his right to freedom of expression in breach of Article 10 of the Convention.

4. On 6 April 2005 the President of the Fourth Section of the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it was decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1952 and lives in Tarnów, Poland.

6. The applicant is a gynaecologist. In August 1995 he set up a company which prepared medical reports at his clients' request.

7. On 12 March 1996 the applicant wrote a report entitled "Civil opinion" (*opinia cywilna*) on the treatment that Mr J.M. had undergone in the Regional Hepatology Clinic in Tarnów. The opinion described, in a detailed manner, the history of Mr J.M.'s medical treatment since the beginning of the 1980s. The report was based on Mr J.M.'s medical file obtained from the clinics of hepatology and dermatology where he had received treatment. The applicant also relied on the results of a recent medical examination, a biopsy, carried out at the applicant's initiative by the Cracow University Medical Academy. In his report the applicant established that the patient had been receiving treatment since 1983 at the Tarnów Clinic. However, in spite of the fact that his health had deteriorated and that he had been developing symptoms of liver damage, no specialised examination, that is, a biopsy, had been carried out. A recent liver biopsy, undertaken upon the applicant's recommendation at the Cracow University Medical Academy, had shown that the patient was suffering from aggressive and chronic hepatitis and cirrhosis (*przewlekłe agresywne zapalenie wątroby z marskością wątroby*). The applicant considered that the damage to Mr J.M.'s health, due to both his liver condition and dermatological problems, amounted to 90% thus making him eligible to receive the highest group of invalidity allowance. With regard to the treatment received at the Tarnów Hepatology Clinic the applicant's report stated:

> "...Despite [the patient's] chronic suffering, of which he had complained constantly during his regular visits, and which was confirmed by examinations indicating a chronic liver condition, the employees of the Clinic had failed to take the actions [necessary] for the health care of [the patient] and his diagnosis. So, despite indications, adequate diligence while diagnosing, informing and providing health care to [the patient] was not displayed."

The opinion also dealt with the treatment of Mr J.M.'s dermatological problems at the Tarnów Dermatology Clinic and concluded that it had been proper and diligent.

8. On 2 December 1996 the Tarnów Regional Attorney for Professional Liability (*Okręgowy Rzecznik Odpowiedzialności Zawodowej*) instituted disciplinary proceedings against the applicant. He was charged with unethical conduct, reference being made to the fact that the applicant's opinion had discredited the doctors who had been treating the patient. The Regional Attorney relied on Article 52 of the Polish Code of Medical Ethics (*Kodeks Etyki Lekarskiej*). Moreover, according to the Regional Attorney, in assessing a complicated therapy in which he did not specialise, the applicant had overstepped his professional competences. In his application of 10 March 1997 lodged with the Tarnów Regional Medical Court (*Okręgowy Sąd Lekarski*), in which he asked for a disciplinary punishment to be imposed on the applicant, the Attorney stated:

> “In the present case the Attorney established that Dr Ryszard Frankowicz, by preparing and giving the patient an opinion in which he included judgments on the professional conduct of other doctors (working in the Tarnów Hepatology Clinic), obviously violated the well-established medical society rules of proper conduct between doctors.
>
> Unfavourable arguments and analysis of professional actions expressed by one doctor in front of a patient always clearly discredit the doctor under scrutiny...”

> “The Medical Council of the Tarnów Regional Medical Chamber finds that the entirety of the public behaviour of [the applicant] has no support in the medical profession and does not serve the rightly understood well-being of the patient. The disciplinary bodies of the Chamber will assess their attitudes in detail and draw appropriate conclusions (*wyciągną stosowne wnioski*). The Medical Council decided to take a position on the public activities of the above-mentioned doctors and the manner in which they have been exercising the medical profession given the exceptional departure from recognised and generally accepted rules and given the possibility of their manipulating the perceptions and the behaviour of the local community.”

9. On 11 June 1997 the Tarnów Regional Medical Court (*Okręgowy Sąd Lekarski*) held a hearing. The court was composed of three members, all doctors. The applicant, his wife, their representative and a representative of the Office of the Regional Attorney of Professional Liability were present at the hearing. However, soon after the opening of the hearing the applicant decided to leave the courtroom, objecting to the fact that the disciplinary court had allegedly violated a time-limit for examination of a case. The hearing continued in the applicant’s absence as he had not decided to return and the court regarded his absence as unjustified.

10. On 17 June 1997 the Regional Medical Court found the applicant guilty of unethical conduct. The Court considered that the applicant, in his report, had expressed negative opinions of the professional conduct of doctors concerned and that he had conveyed these directly to the patient. In so doing, he had discredited the doctors in the eyes of the patient. His behaviour was therefore contrary to the principle of professional solidarity and, consequently, to the provisions of Article 52 of the Code of Medical Ethics. The court did not examine the truthfulness of the opinion at issue as it found that the question of whether it “reflected the reality” was “of no importance” for finding a violation of this provision of the Code. The disciplinary court also found that the applicant had violated Article 10 of the Code, as he had written an opinion concerning a branch of medicine in which he was not a specialist. The court found him guilty as charged and sentenced him to a reprimand (*skazuje na karę nagany*).

11. On 17 June 1997 the applicant challenged all members of the court, complaining that they had not been impartial. The applicant submitted that the independence and impartiality of the members of the disciplinary court had been open to doubt because it was possible that the Tarnów Governor could have put pressure on them. In addition the applicant complained about

the way the hearing had been conducted, submitting that the President of the court had prevented him from putting all his questions and had dismissed his motions. On 20 June 1997 the Tarnów Regional Medical Court, sitting in a different composition, dismissed the applicant's challenge as manifestly ill-founded.

12. The applicant appealed on 30 June 1997. He argued that a doctor had a right to express freely his own opinion in conformity with his medical knowledge and his conscience and to inform his patient if he believed that the latter had been incorrectly treated or wrongly diagnosed. The purpose of a doctor's work was the well-being of the patient and not professional solidarity with other doctors. The applicant further complained that his challenge to the members of the Regional Medical Court, and application to transfer the case to another town, had been dismissed. He submitted that two of the three members of the court were senior managers of the hospitals thus susceptible to pressure from the Tarnów Governor's office, the latter often being criticised by the applicant's association.

13. On 29 May 1998 the Supreme Medical Court (*Naczelny Sąd Lekarski*), upheld the first-instance court's decision. The court considered that the applicant's actions were highly reprehensible and harmful not only to the medical profession but also to the patient, as the opinion gave him to believe, groundlessly, that he had been the victim of an injustice. The court also firmly rejected the applicant's suggestion that his conviction had been the result of political pressure. A copy of that decision was served on the applicant on 30 July 1999.

II. RELEVANT DOMESTIC LAW

A. The Constitution of the Republic of Poland

14. The Constitution of 2 April 1997 entered into force on 17 October 1997.

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."

15. A right to lodge a constitutional complaint was introduced in Article 79 § 1 which provides as follows:

> "In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Court for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution."

B. Code of Medical Ethics

16. Article 10 of the Polish Code of Medical Ethics, set out in Chapter I, entitled "Relations between a physician and his patient" (*Postępowanie lekarza wobec pacjenta*) reads, in so far as relevant:

> "1. A physician should not exceed the limits of his or her professional competence when carrying out diagnosis, prophylaxis and treatment..."

17. Article 52 of Chapter III, entitled "Mutual relations between physicians" (*Stosunki wzajemne między lekarzami*) provides as follows:

> "1. Physicians must show respect to each other.
>
> 2. A physician should not express an unfavourable opinion on the professional conduct of another physician or discredit him in any other way in the presence of a patient, his or her environment or [in the presence of] assisting staff.
>
> 3. All comments on the observed erroneous conduct of a physician should, in the first place, be passed on to him or her. Informing a medical court of the observed unethical behaviour or professional incompetence of another physician does not undermine the principle of professional solidarity."

18. On 20 September 2003 Article 52 §2 was amended. It reads as follows:

> "A physician should display particular caution in formulating opinions on the professional conduct of another doctor and in particular he should not in any way discredit him publicly."

C. Law on Medical Chambers

19. According to section 1 of the Law of 17 May 1989 on Medical Chambers (*Ustawa o Izbach Lekarskich*), as it stood at the material time, the administrative units of medical self-government were the Supreme Medical Chamber (*Naczelna Izba Lekarska*) and regional medical chambers (*okręgowe izby lekarskie*). Section 19 provided that a regional medical chamber includes all physicians whose names are entered on its register.

20. Bodies of a regional medical chamber included, among others, a regional medical court *(okręgowy sąd lekarski*) and a regional attorney for professional liability (section 20). The Supreme Medical Court (*Naczelny Sąd Lekarski*) was a body of the Supreme Medical Chamber (section 31). According to section 7, the term of office of all bodies of medical chambers was four years.

21. Section 41 of the Law, in Chapter 6, entitled "Professional Liability" (*Odpowiedzialność zawodowa*), provided:

> "Members of the medical self-government shall be professionally liable before medical courts for any conduct in breach of the principles of professional ethics and

deontology and for any breach of the provisions governing the exercise of the medical profession."

Section 42 read, in so far as relevant:

"1. The medical court may impose the following penalties:

1) censure (*upomnienie*),

2) reprimand (*nagana*),

3) suspension from practice (*zawieszenie prawa do wykonywania zawodu*) for a period from six months to three years,

4) revocation of the right to practise medicine (*pozbawienie prawa wykonywania zawodu*).

2. A physician, on whom the Supreme Medical Court sitting at second instance has imposed any penalty referred to in subsections (3) or (4), has the right to lodge an appeal with the Supreme Court within 14 days from the date on which the [court's] decision has been served on him or her..."

22. According to section 46, matters of professional liability of medical practitioners were examined by regional medical courts and the Supreme Medical Court.

23. A physician on whom a reprimand or suspension from practice had been imposed lost eligibility for election to bodies of medical chambers until a notice of penalty was removed from the relevant register (section 47). The notice was removed from the register three years after the decision to impose a censure or reprimand became final (section 55).

24. According to section 54 the members of the Medical Courts were, in their adjudicating capacity, independent and should follow the law and the Code of Medical Ethics. Article 7 provided that the term of office of all bodies of the medical chambers was four years. As provided in section 56, the Supreme Medical Court, sitting as a second-instance court, included a judge of the Supreme Court appointed by the First President of the Supreme Court.

D. The Constitutional Court's judgment of 23 April 2008

25. On 23 April 2008 the Constitutional Court delivered a judgment (SK16/07) in which it found that Article 52 § 2 of the Code of Medical Ethics was unconstitutional in so far as it prohibited the truthful public assessment of the activity of a doctor by another doctor in the public interest. The relevant provision, examined in its new wording which came into force in 2003, was not quashed by the Constitutional Court as only its particular interpretation was considered to breach the constitutional norm securing the freedom of expression.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

26. The Government argued that the applicant had failed to exhaust all the remedies available under Polish law as required by Article 35 § 1 of the Convention. They noted that the applicant had not lodged a constitutional complaint against the relevant provisions of the 1989 Law on Medical Chambers.

As regards the applicant's complaint raised under Article 6 § 1 of the Convention, the Government considered that the Constitutional Court would have been competent to examine whether the proceedings before the Medical Courts met the requirements of impartiality and independence. They submitted that a similar complaint concerning disciplinary proceedings for members of the Bar Association had been lodged with the Constitutional Court. However the Government failed to inform the Court about the outcome of these proceedings.

With regard to the applicant's complaint that his right to freedom of expression had been violated, the Government submitted that on 23 April 2008 the Constitutional Court had delivered a judgment finding that the provisions of the Code of Medical Ethics, which had been the basis for the applicant's conviction, had been unconstitutional. In the Government's opinion it proved that lodging a constitutional complaint with the Constitutional Court would have been an effective remedy in the applicant's case.

The Government also submitted that it had been open to the applicant to bring an action under Article 23 of the Civil Code to seek to establish that the proceedings against him had breached his personal rights protected by the Civil Code, and to seek damages.

27. The applicant contested the Government's arguments, maintaining that he had appealed against the domestic decisions in accordance with the law. In particular, he submitted that the remedies proposed by the Government were of a theoretical nature and not practical and effective. The constitutional complaint was an extraordinary remedy and he should not have been obliged to exhaust it. Moreover, he maintained that if any additional remedy had been open to him, he should have been informed of this when the authorities gave the final domestic decision. Finally, as regards the possibility of his lodging a civil action, the applicant argued that he would have been required to prove that he had sustained damage by the unlawful action of an official, while the decisions given in his case had a legal basis in the domestic law.

28. The Court 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).

29. The Court notes that the Government's objection that the applicant had failed to exhaust domestic remedies since he should have lodged civil proceedings for compensation for breach of his personal rights is confined to a mere assertion and there are no further arguments or domestic court decisions indicating that recourse to such an action in the circumstances of the applicant's case would have offered any reasonable prospects of success.

As far as the Government's objection refers to the effectiveness of the constitutional complaint with respect to the applicant's allegations under Article 6 § 1 of the Convention, the Court notes that the Government relied on a press article about a constitutional complaint lodged in 2005 by members of the Bar Association. The Government failed to provide any additional information about this complaint or a relevant decision of the Constitutional Court.

30. As regards the Constitutional Court's judgment of 23 April 2008, the Court notes that it was delivered almost ten years after the proceedings in the present case ended. Any relevance that these proceedings might possibly have in respect of the present case is therefore reduced by the fact that it took place so long after the relevant time (see, for example, *V. v. the United Kingdom* [GC], no. 24888/94, § 57, ECHR 1999-IX). Moreover, the Constitutional Court examined the constitutionality of Article 52 § 2 of the Code of Medical Ethics in its wording as amended in 2003 and not as it stood at the material time. The Court also observes that the applicant was found guilty, in addition to Article 52 § 2, of a breach of Article 10 of the Code of Medical Ethics, the constitutionality of which was not examined by the Constitutional Court.

31. Furthermore, the Court observes that at the material time, in May 1998, the right to lodge an individual constitutional complaint was a new instrument introduced by the 1997 Constitution, in force since October 1997. At this early stage of its evolution there had been no case law of the Constitutional Court demonstrating the effectiveness of the individual complaint. Thus the Court considers that, in the particular circumstances of the present the case, the applicant did everything that could reasonably be expected of him to exhaust the national channels of redress (see *Aksoy v. Turkey*, 18 December 1996, § 54, *Reports of Judgments and Decisions* 1996-VI; *Hansen v. Turkey*, (dec) no. 36141/97, 19 June 2001).

32. It follows that the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

33. The applicant complained about 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

34. The Court notes that this complaint 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 (see paragraph 32 above). It must therefore be declared admissible.

B. Merits

1. The parties' submissions

35. The applicant submitted in a general manner that, as a doctor, he should have had a right to state his opinion on the treatment received by his patient from another doctor. He argued that the medical court's decisions showed the hostile attitude of the medical authorities towards his community work, as he had been active in an association. The applicant also maintained that the reprimand by the Medical Court was an element of persecution by the medical authorities and was caused by the fact that he had been the President of the Association for the Protection of the Rights of Patients in Poland and had been fighting for the interests of patients.

The applicant argued that the reprimand ordered by the Medical Court was a harsh penalty as he had been prevented from applying for and taking up management functions in hospitals and public administration. He

submitted that he had been the victim of a campaign launched against him by the medical society. As a result, he could not take a post of director in the Ministry of Health, had difficulties in finding a job, had to close down his private practice and was prevented from taking up an additional specialisation.

36. The Government submitted that there had been no interference with the applicant's right to freedom of expression. They maintained that the applicant had discredited another doctor before the patient and that he had prepared a critical opinion on the patient's medical treatment without having adequate medical specialisation and expertise. The Government reiterated that the applicant had been giving critical opinions on other doctors within his commercial activity, and thus the disciplinary courts had been right to punish him and thus prevent him from abusing the rights of other doctors any further. The Government maintained that the provision of Article 52 of the Code of Medical Ethics was aimed at maintaining good relations between doctors and preserving the principle of professional solidarity. While the Code of Medical Ethics does not prevent doctors from making critical statements on other practitioners, certain rules should be observed, for example a doctor should not discredit another colleague in the presence of the patient. The Government also maintained that the applicant did not have sufficient knowledge to comment on treatment relating to a field of medicine in which he had not practised. In consequence, the Medical Court had correctly imposed a reprimand on the applicant and thus prevented him from infringing ethical rules and rules regarding competition.

37. The penalty imposed on the applicant was necessary for the protection of other doctors' rights and reputation and was the most lenient possible. In sum, the interference was necessary to achieve a balance between the protection of patients' health, the interests of other medical practitioners and the applicant's right to freedom of expression. The Government submitted that there had been no violation of Article 10 of the Convention.

2. *The Court's assessment*

(a) The general principles

38. 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)*, 23 May 1991,

§ 57, Series A no. 204, and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

39. The Court would also point out that Article 10 guarantees freedom of expression to "everyone". The Court has held on many occasions that Article 10 applies to all kinds of information or ideas or forms of expression including when the type of aim pursued is profit-making or relates to a commercial activity of an applicant (see *Casado Coca v. Spain*, 24 February 1994, § 35, Series A no. 285-A, *Barthold v. Germany*, 25 March 1985, § 42, Series A no. 90 and *Stambuk v. Germany*, no. 37928/97, §§ 43-52, 17 October 2002).

40. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the publication held against the applicant and the general context of the publication. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see Sunday Times (no. 1) *v. the United Kingdom*, 26 April 1979, § 62, Series A no. 30). In doing so, 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 themselves on an acceptable assessment of the relevant facts.

41. Under the Court's case-law, the States parties to the Convention have a certain margin of appreciation in assessing the necessity of an interference, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them (see, *inter alia*, *markt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, § 33, Series A no. 165 and *Casado Coca*, cited above, § 50).

(b) The application of the general principles to the above case

42. The Court must first determine whether the impugned conviction amounted to an "interference" with the exercise of the applicant's right to freedom of expression. It notes that the Government submitted that there had been no interference with the applicant's rights as the opinion in question had been made in the context of his commercial activity.

43. The Court observes that a disciplinary sanction had been imposed on the applicant for having prepared an opinion on the treatment received by a patient which was critical of another doctor. He had been sanctioned by the Medical Court for having breached the Code of Ethics and reprimanded. The Court points out that notice of the sanction remained in the applicant's file for 3 years and that it was not claimed by the parties that the penalty did not constitute a detriment to the applicant.

44. The Court reiterates that, contrary to the Government's opinion, matters relating to professional practice are not removed from the protection of Article 10 of the Convention (see paragraph 39 above). The Court thus

considers that the applicant's conviction and disciplinary sanction for having expressed a critical opinion on medical treatment received by a patient amounted to an interference with his right to freedom of expression.

45. Such interference infringes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. It must therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" to achieve such aims.

46. The Court finds, and this was not disputed, that the interference was "prescribed by law," the applicant's disciplinary sanction having been based on Articles 52 § 2 and 10 of the Code of Medical Ethics (see paragraph 10 above). The Court agrees with the Government that the interference with the applicant's right to freedom of expression was intended to pursue a legitimate aim referred to in Article 10 § 2 of the Convention, namely to protect the rights and reputation of others.

47. The Court will then examine whether the interference with the applicant's right to freedom of expression was necessary in a democratic society. The Court recalls that the applicant, a medical practitioner, wrote an opinion in which he criticised medical treatment received by a patient. The disciplinary authorities considered the applicant guilty of unethical conduct in breach of the principle of professional solidarity, in violation of the Code of Medical Ethics.

48. The applicant based his report on the patient's medical file, and on the results of some additional medical examinations which the patient had undergone at his suggestion. The opinion was requested by the patient himself who turned to the applicant's company, which specialised in preparing assessments of medical treatment undertaken by patients. The opinion was then handed to the patient, who could use it for whatever purpose he intended. However there is no indication that it was subsequently published or otherwise made known to a wider public.

49. The Court has previously agreed, in the context of lawyers, members of the Bar, that the special nature of the profession practised by an applicant must be considered in assessing whether the restriction on the applicant's right answered any pressing need (see *Steur v. the Netherlands*, no. 39657/98, § 38, ECHR 2003-XI). Medical practitioners also enjoy a special relationship with patients based on trust, confidentiality and confidence that the former will use all available knowledge and means for ensuring the well-being of the latter. That can imply a need to preserve solidarity among members of the profession. On the other hand, the Court considers that a patient has a right to consult another doctor in order to obtain a second opinon about the treatment he has received and to expect a fair and objective evaluation of his doctor's actions.

50. The fact that the opinion in question was issued within the framework of the applicant's commercial activity, and was critical of

another doctor, does not automatically deprive it of genuineness or objectivity. The Court observes that the domestic authorities, in finding that the applicant had discredited another doctor, did not make any serious assessment of the truthfulness of the statements included in the opinion (see *Veraart v. the Netherlands*, no. 10807/04, §§ 60 and 61, 30 November 2006). The Regional Medical Court found that, since no criticism of another doctor was permissible, the question of whether the applicant's report actually reflected reality had been without importance.

51. Such a strict interpretation by the disciplinary courts of the domestic law as to ban any critical expression in the medical profession is not consonant with the right to freedom of expression (see *Stambuk*, cited above, § 50). This approach to the matter of expressing a critical opinion of a colleague, even in the context of the medical profession, risks discouraging medical practitioners from providing their patients with an objective view of their state of health and treatment received, which in turn could jeopardise the ultimate goal of the doctor's profession - that is to protect the health and life of patients.

52. Finally the Court notes that the domestic authorities did not examine whether the applicant had been defending a socially justified interest. The Court considers that the applicant's opinion was not a gratuitous personal attack on another doctor, but a critical assessment, from a medical point of view, of treatment received by his patient from another doctor. Thus, it concerned issues of public interest.

53. In conclusion the interference complained of was not proportionate to the legitimate aim pursued and, accordingly, was not "necessary in a democratic society" "for the protection of the rights of others". Consequently, it gave rise to a violation of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

54. The applicant complained that the Medical Courts which decided in the proceedings against him cannot be considered "an independent and impartial tribunal" as provided in Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

55. The Government contested that argument.

A. Applicability of Article 6 of the Convention

56. As a preliminary issue, the Court has to determine whether Article 6 of the Convention is applicable to the proceedings in issue. It is clear from

the Court's case-law that where, as in the instant case, what is at stake is the right to continue to practise medicine as a private practitioner, disciplinary proceedings give rise to "*contestations* (disputes) over civil rights" within the meaning of Article 6 § 1 (see, among other authorities, *König v. Germany*, 28 June 1978, §§ 87–95, Series A no. 27; *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, §§ 41 - 51, Series A no. 43; *Albert and Le Compte v. Belgium*, 10 February 1983, §§ 25–29, Series A no. 58 and *Gautrin and Others v. France*, 20 May 1998, § 33, *Reports* 1998-III, *Gubler v. France*, no. 69742/01, § 24, 27 July 2006).

Moreover, the parties did not dispute before the Court that Article 6 § 1 is applicable to the circumstances of this case.

The Court thus finds that this Article, under its civil head, is applicable to the present case.

B. Admissibility

57. The Court notes that this complaint 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 (see paragraph 33 above). It must therefore be declared admissible.

C. Merits

1. The parties' submissions

58. The applicant submitted that there had been a violation of Article 6 § 1 of the Convention in that he had been deprived of the right to a fair trial by an impartial tribunal. He submitted that the judges sitting in the Regional and Supreme Medical Courts had not been independent, as those bodies had been composed of doctors, members of the Regional Medical Council, and thus represented the interests of the doctors' lobby. Only one of the five members of the Supreme Medical Court was a professional judge, delegated from the Supreme Court. However, such a judge would often follow the conclusions of the majority. Moreover, the applicant's case had not been heard at the later stage by an impartial tribunal as the domestic law did not provide for a right to appeal to a court against the decision of the Medical Court when it had imposed a penalty taking the form of a reprimand.

59. The Government submitted that the proceedings in the applicant's case had been conducted fairly and that the applicant had enjoyed all procedural guarantees under Article 6 § 1 of the Convention. The applicant had been represented and his case heard at two instances before Medical Courts which had been independent and impartial. As regards the personal

impartiality of the members of the Medical Courts, the Government argued that they had been impartial and that there was no proof to the contrary. Although the applicant had attempted to challenge the members of the Medical Court, this challenge had not included any specific complaint or evidence pointing to a lack of impartiality; it had thus been dismissed as manifestly ill-founded. The Government, referring to the *Albert and Le Compte* case (cited above), submitted that it had been necessary for the members of the Medical Courts to have expertise in medicine. They had been independent in exercising their functions and had followed the law and the Code of Ethics. Moreover, one judge sitting in the Supreme Medical Court had been appointed by the Supreme Court. The Government concluded that there had been no violation of Article 6 § 1 of the Convention.

2. The Court's assessment

60. The Court reiterates that, even in instances where Article 6 § 1 of the Convention is applicable, conferring the duty of adjudicating on disciplinary offences on professional disciplinary bodies does not in itself infringe the Convention. Nonetheless, in such circumstances the Convention calls for at least one of the following two systems: either the professional disciplinary bodies themselves comply with the requirements of that Article, or they do not so comply but are subject to subsequent review by a judicial body which has full jurisdiction and does provide the guarantees of Article 6 § 1 (see *Albert and Le Compte* cited above, § 29, and *Gautrin*, cited above, § 57).

61. The applicant maintained that the Regional and Supreme Medical Courts, which decided his case, lacked independence and impartiality.

62. There are two tests for assessing whether a tribunal is impartial within the meaning of Article 6 § 1: the first consists in seeking to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, among other authorities, *mutatis mutandis*, *Saraiva de Carvalho v. Portugal,* 22 April 1994, § 33, Series A no. 286-B and *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII and, *a contrario*, *Brudnicka and Others v. Poland*, no. 54723/00, § 41, ECHR 2005-II).

63. As regards the subjective approach, the Court reiterates that the personal impartiality of each member must be presumed until there is proof to the contrary. In the present case the applicant exercised his right to challenge the impartiality of the judges composing the Regional Medical Court on the ground that they might be subject to pressure from the Tarnów Governor (see paragraph 11 above). The Government maintained that the challenge had not been specified or substantiated. The Court considers that the substance of his challenge was that the disciplinary courts, being composed of medical practitioners and not professional judges, might be

under pressure from their hierarchical superiors or local government. However, the applicant failed to provide any *prima facie* evidence that the Tarnów Governor had put, or attempted to put, pressure on the members of the Medical Court. Moreover, there is no indication of any personal prejudice or bias on the part of the members of the disciplinary courts and indeed the applicant does not suggest this.

As regards the manner in which the challenges to the three members of the Regional Medical Court were examined, the Court observes that they were dealt with by the court sitting in a different composition (see in this connection *Debled v. Belgium*, 22 September 1994, § 37, Series A no. 292-B). The dismissal of the applicant's challenge to particular members of the court and the refusal to transfer the case to another region were adverted to by the applicant in his appeal. However, the Supreme Medical Court dismissed the appeal, considering as unfounded the allegation that the members of the Regional Court had been put under pressure when dealing with the applicant's case.

64. As to the issue of objective and structural impartiality, the Court observes that the members of the Medical Courts were elected from among medical practitioners for a period of four years and they acted not as representatives of medical self-government but in their personal capacity. Moreover, in the composition of the Supreme Medical Court there was one professional judge appointed by the Supreme Court (see paragraph 25 above). As for the impartiality of the members from an objective and organisational point of view, the applicant did not raise any additional, specific, complaints in this respect. In any event, there were sufficient safeguards to exclude any legitimate doubt about the Medical Courts impartiality (see, *a contrario*, *Kyprianou*, cited above, §§ 127 and 128).

65. The Court is also satisfied, and it has not been disputed by the parties, that both bodies were established by law, that is, the 1989 Law on Medical Chambers (see paragraph 20 above).

66. The Court finally notes that, at the material time, the decisions of the Medical Courts, if their consequence was suspension from practice and revocation of the right to practise, were open to appeal to the Supreme Court - which offered an additional safeguard as regards the requirements of Article 6 § 1 of the Convention.

67. Regard being had to all the circumstances examined above, the Court considers that the applicant's doubts about the independence and impartiality of the members of the Medical Courts that reprimanded him for having breached the Code of Medical Ethics have not been sufficiently substantiated (see *Gubler v. France*, no. 69742/01, § 30, 27 July 2006). Thus, there has been no violation of Article 6 § 1 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

69. The applicant claimed 316,000 Polish zlotys (PLN) in respect of pecuniary damage. This sum covered loss of wages for the period of nine years during which he had difficulties practising medicine given the reprimand by the medical court and the hostility of the medical authorities towards him.

70. As to non-pecuniary damage, the applicant claimed PLN 10,000 by way of symbolic compensation for suffering endured by him and his family.

71. The Government submitted that the applicant's claim in relation to pecuniary damage, with respect to the loss of hypothetical income, did not have a causal link with the alleged violations of the Convention. With regard to non-pecuniary damage, the Government argued that the sum claimed by the applicant was excessive. They invited the Court to rule that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

72. With regard to pecuniary damage the Court finds that there is no causal link between the damage claimed and the violation found. It therefore dismisses this claim. The Court considers, however, that the applicant must have sustained non-pecuniary damage and that sufficient just satisfaction would not be provided solely by a finding of a violation of the Convention. It awards the applicant EUR 3,000 under this head.

B. Costs and expenses

73. The applicant did not claim reimbursement of any costs and expenses.

C. Default interest

74. 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* that there has been no violation of Article 6 § 1 of the Convention;

4. *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) in respect of non-pecuniary damage, plus any tax that may be chargeable, 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;

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

Done in English, and notified in writing on 16 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President