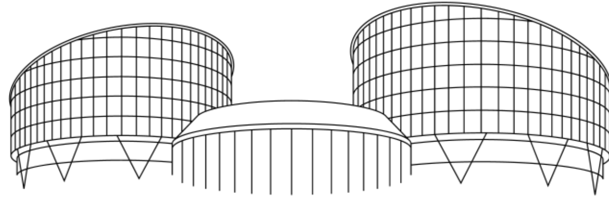

FOURTH SECTION

CASE OF SOSINOWSKA v. POLAND

(Application no. 10247/09)

JUDGMENT

STRASBOURG

18 October 2011

FINAL

18/01/2012

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

In the case of Sosinowska v. Poland**,**

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

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 27 September 2011,

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

PROCEDURE

1. The case originated in an application (no. 10247/09) 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, Ms Bożena Sosinowska (“the applicant”), on 14 February 2009.

2. The applicant was represented by Mr L. Mrozek, a lawyer practising in Chorzów. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

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

4. On 26 April 2010 the President of the Fourth Section decided to give notice of the application to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a specialist in lung diseases. She had worked since 1992 in a hospital in Ruda Śląska. On an unspecified later date W.R.K. became chief physician of the ward in which the applicant worked. A serious conflict arose between them, the applicant becoming increasingly

critical of various decisions taken by W.R.K. in the diagnosis and treatment of the ward's patients.

6. On 16 September 2004 the applicant wrote to Professor J.K. who was at that time a regional consultant for lung diseases. She submitted that W.R.K.'s conduct had demonstrated that she [that is, W.R.K.] lacked appropriate skills to run the ward as her clinical experience and judgment left much to be desired. The applicant referred to the cases of seven patients who had been treated in the ward and indicated shortcomings which she perceived as errors in their diagnosis and treatment. She stated that W.R.K. had often behaved in a manner contrary to professional ethics, by questioning the applicant's clinical judgment and by denigrating her in the eyes of patients and the ward's medical staff. She declared that she would not have bothered the professor with this problem if not for the fact that W.R.K. had threatened her with dismissal for refusing to comply with her orders.

7. On 5 November 2005 the hospital dismissed the applicant on the grounds of a serious failure to comply with her duties within the meaning of Article 52 of the Labour Code.

8. The applicant filed a compensation claim for unlawful dismissal with the Labour Division of the Ruda Śląska District Court.

9. During the proceedings the court heard as witnesses W.R.K., E.Ch., who was at that time the director of the hospital, J.W. - the former Head Physician of that hospital, two doctors working in the ward M.M. and Z.L., and H.W., the leader of the trade union branch at the hospital. It also had regard to the applicant's employment file and to the medical records of various patients treated in the ward.

10. By a judgment of 22 December 2005 the court allowed the applicant's claim and awarded her compensation in the amount of 9,413 Polish zlotys (PLN) with statutory interest payable from 6 November 2004.

11. The court found that the applicant was a very good specialist. It further established that a serious and long-standing conflict had arisen between her and W.R.K. On an unspecified date in 2004 the former chief physician of the hospital, J.W., had decided to intervene in the conflict, but had subsequently given notice on his contract in September of that year and had left before doing so. Dr E.Ch. had taken over his duties. In 2004 she had reviewed the ward patients' medical records and found no irregularities. On an unspecified date, apparently also in 2004, the applicant had informed the director of her doubts as to the correctness of certain diagnostic and therapeutic decisions made by W.R.K. The applicant had also informed Dr E.Ch. that she had shown certain patients' records to the regional consultant, asking for his opinion. She had handed over to Dr E.Ch. a copy of her letter to the consultant. Dr E.Ch. had expressed no objections.

12. The court further found that it had been normal practice in the ward that medical records were kept by the treating doctor. It had not been established, in the light of the evidence before the court, that the applicant had made any irregular changes, amendments to or comments in the records kept by other doctors or had otherwise tampered with their content.

13. The court noted that the evidence given by W.R.K. concerning the allegations that the applicant had improperly amended the medical records and refused to follow her orders lacked credibility. It was not in dispute between the parties that a serious conflict between the applicant and W.R.K. had made it almost impossible for the ward to function normally. W.R.K., in her capacity as head physician of the ward, had proved unable to take any steps to defuse that conflict. Likewise, the hospital's medical director, Dr E. Ch., had not taken any reasonable steps to address the situation. The court was of the view that the applicant had been dismissed because the hospital authorities had considered that her dismissal was simply the easiest way of getting rid of the problem.

14. The court further held that the allegations that the applicant had made errors and about the alleged irregularities in the manner in which she had administered the patients' medical records had not been confirmed by the evidence. The fact that the applicant, when she had been in doubt as to the correctness of the medical decisions taken in respect of some patients, had shown their records to the regional consultant asking for guidance, did not amount to any irregularity. Indeed, such conduct was expressly recommended by the Law on the Profession of Physicians. The applicant's conduct also had to be seen in the context of the fact that she could not expect any assistance, clinical or otherwise, from her superior W.R.K.

15. The court observed that it was the superior's obligation to organise the work of the ward in such a way as to make full use of the employees' professional potential and their time. It was unethical on the superior's part to exacerbate a conflict with a member of staff.

16. The court referred to the procedure by which the applicant had been dismissed, including the consultation with the local branch of the trade union. It found that the procedure had not complied with the requirements laid down in the Labour Code.

17. The court concluded that the applicant's dismissal was unjustified and unlawful as her conduct could not reasonably have been said to amount to a serious breach of her professional obligations and awarded her compensation.

18. The hospital appealed. By a judgment of 28 June 2006 the Gliwice Regional Court dismissed the appeal.

19. By a letter of 3 November 2004 the applicant requested the Katowice Regional Medical Chamber to intervene in the conflict between herself and W.R.K. She submitted, *inter alia,* that the head physician had perceived her as a professional threat. As she could not find genuine reasons

to criticise the applicant, she had started to bully her. Ultimately, she had untruthfully complained to the then director of the hospital that the applicant had been refusing to comply with her orders. As a result, the applicant had been dismissed. The applicant requested that a professional supervision commission be set up to examine W.R.K.'s working methods. She attached a list of professional errors which, in the applicant's view, W.R.K. had committed and which had come to light during her numerous confrontations with W.R.K.

20. By a decision of 20 January 2005 the Katowice Regional Attorney for Professional Liability (O*kręgowy Rzecznik Odpowiedzialności Zawodowej* – "the Regional Attorney") refused to institute an investigation, finding that the applicant had submitted her request against the background of the conflict with her boss.

21. The applicant appealed. She submitted, *inter alia*, that she was upset by the arguments advanced by the Regional Attorney that she had no right to criticise the head physician even when the latter was acting to the patients' detriment.

22. On 31 May 2006 the Principal Attorney for Professional Liability (*Główny Rzecznik Odpowiedzialności Zawodowej*) quashed the decision of 20 January 2005 and remitted the case.

23. On 18 August 2006 the Katowice Regional Attorney refused to institute proceedings following the applicant's complaint against W.R.K.

24. On 22 August 2006 he instituted an investigation against the applicant based on suspicion of unethical behaviour towards a colleague and superior. On 13 October 2006 he brought a case against her before the Katowice Regional Medical Court ("the Regional Medical Court") for offences specified by Articles 52 (1), 52 (2), 52 (3) and 1 (3) of the Code of Medical Ethics *inter alia* for "openly criticising her superior's diagnostic and therapeutic decisions, in the presence of other colleagues and members of medical and non-medical staff".

25. The Regional Medical Court subsequently questioned as witnesses W.R.K., E.Ch. and K.K., a director of the hospital.

26. On an unspecified later date a copy of the judgment of the Labour Court (see paragraphs 8 to 17 above) was included in the case file.

27. On 14 September 2007 the Regional Medical Court found the applicant guilty of unethical conduct, punishable under Article 52, paragraphs (1), (2) and (3) of the Code of Medical Ethics as amended in 2003 and under Article 1 paragraph (3) of that Code. The conduct was said to consist of: failure to comply with her superior's orders (paragraph 1); publicly making disparaging statements about her superior to the medical staff of the ward (paragraph 2); informing other doctors about what she perceived to be erroneous decisions on her superior's part and taking patients' medical records out of the hospital to show them to the regional

consultant (paragraph 3); and inability to work in a medical team (Article 1 paragraph 3 of the Code).

The court imposed a reprimand (*nagana*) on the applicant.

The court found that the applicant had been in conflict with W.R.K.; that she had openly and persistently expressed negative opinions about W.R.K.'s qualifications in the presence of other doctors and medical staff and even in the presence of patients and their families, which constituted an offence under Article 52 (2) of the Code of Medical Ethics. The applicant was also found guilty of refusing to comply with her superior's orders and of amending medical records without informing her superior, an offence punishable under Article 52 (1) of that Code. She was further found to be in breach of Article 52 (3) by having informed other doctors of the allegedly erroneous decisions of her superior and by having taken the medical records out of the ward to show them to the regional consultant.

28. The applicant's lawyer filed an appeal against the judgment with the Supreme Medical Court (*Naczelny Sąd Lekarski*). He submitted that the court had failed to respect the provisions of the Code of Criminal Procedure governing the proceedings, by disregarding the applicant's request for evidence to be admitted from the file of the labour case; disregarding the applicant's requests that the evidence submitted in her written reply to the charges brought against her be considered and failing to make a formal decision refusing to take this evidence; failing to specify the time and place where the applicant had committed the alleged offences and by putting leading questions to the witnesses.

It was further argued that the first-instance court had entirely failed to take into consideration the findings of fact made by the labour court.

29. It was further submitted that the applicant should not have been penalised for expressing her views. The court had breached the Code of Medical Ethics, Article 52 (4) of which provided that informing the Medical Chamber of a breach of medical ethics committed by another doctor or about his or her professional incompetence could not be interpreted as a violation of ethical rules. The applicant had informed the Medical Chamber in 2004 about W.R.K.'s conduct which had been, in her view, both unprofessional and unethical. She had also requested the Chamber's assistance in defusing the professional conflict. However, the Chamber had chosen to penalise her instead.

30. In addition, the court had erred in law in that it had failed to show that the applicant's conduct had resulted in W.R.K. losing the confidence of other doctors or patients and their families, this being necessary for the commission of the offence under Article 52 (2).

31. By a decision of 13 March 2008, served on the applicant's lawyer on 1 September 2008, the Supreme Medical Court dismissed the appeal. It dismissed the applicant's argument that the court had disregarded her request for evidence to be taken. The applicant's dismissal from work had

been unlawful, but, in the court's opinion and contrary to the labour court's view, it did not mean that it had not been justified.

32. As to the first-instance court's failure to establish the dates of the acts with which the applicant had been charged, the second-instance court established that they had occurred between 1 July 2002 and 5 November 2004.

33. The court further noted that the first-instance court had been free and independent in its assessment of the evidence gathered in the proceedings.

34. It further observed that Article 1 (3) of the Code of Medical Ethics provided that any conduct which undermined confidence in the profession was in breach of the profession's dignity. Hence, it was of no relevance that the applicant had first requested the Medical Chamber to intervene.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution of the Republic of Poland

35. Article 54 § 1 of the Polish Constitution which entered into force on 17 October 1997 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."

36. 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."

37. Under its settled case-law, the Constitutional Court has jurisdiction only to examine the compatibility of legal provisions with the Constitution and is not competent to examine the way in which courts interpreted applicable legal provisions in individual cases (e.g. SK 4/99, 19 October 1999; Ts 9/98, 6 April 1998; Ts 56/99, 21 June 1999).

B. Code of Medical Ethics

38. Article 1 § 3 of the Code of Medical Ethics (*Kodeks Etyki Lekarskiej*) reads:

> "Any conduct which undermines trust in the profession amounts to a breach of professional dignity (*godność zawodu*)."

39. Article 10 of the Code, 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..."

40. Article 52 of Chapter III of the Code of Medical Ethics, entitled "Mutual relations between physicians" (*Stosunki wzajemne między lekarzami*), originally read:

> "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."

41. 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."

42. Pursuant to Article 54 of the Code, in the event of any diagnostic or therapeutic doubts, a doctor should, in so far as possible, seek the opinion of another doctor. Such an opinion shall only be of an advisory nature as it is the treating doctor who remains entirely responsible for the therapy and treatment.

C. Law on Medical Chambers

43. According to section 19 of the Law of 17 May 1989 on Medical Chambers (*Ustawa o Izbach Lekarskich*), as it stood at the material time, a regional medical chamber included all physicians whose names are entered on its register. 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).

44. 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) ensure (*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..."

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

46. 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. Section 7 provided that the term of office of all bodies of the medical chambers was four years.

D. Medical Profession Act

47. Section 37 of the 1996 Medical Profession Act provides that in the event of any diagnostic or therapeutic doubts, a doctor may, on his or her own initiative or upon a patient's request and if he or she finds it reasonable in the light of the requirements of medical science, obtain the opinion of a relevant specialist or arrange a consultation with other doctors.

E. Labour Code

48. The rights and obligations of employees are governed by the Labour Code. Pursuant to Article 52 paragraph 1 (1) 3 of that Code an employer can give notice on an employment contract with immediate effect in the case of a serious breach by an employee of his or her essential obligations.

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

49. 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 a truthful public assessment of a doctor's activity 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. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

50. The applicant complained that the imposition of the penalty on her by the medical courts had breached her right guaranteed by Article 10 of the Convention. This provision 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

51. The Government submitted that the applicant had failed to exhaust domestic remedies by failing to lodge a constitutional complaint challenging the compatibility of Article 52 (2) of the Code of Medical Ethics with the Constitution. They argued that on 23 April 2008 the Constitutional Court had declared unconstitutional an interpretation of this provision which penalised doctors for making a truthful public assessment of the conduct of another doctor which was in the public interest. The relevant provision, examined in its wording which came into force in 2003, had not been

quashed by the Constitutional Court as only its overly strict interpretation had been considered to breach the constitutional norms securing the freedom of expression (see paragraph 49 above).

52. The applicant submitted that, firstly, she had been served with a copy of the second-instance judgment on 2 September 2008, a long time after the Constitutional Court's judgment of 23 April 2008.

She further argued that in any event lodging a constitutional complaint in her case would have been futile, as by that time the Constitutional Court had already declared Article 52 (2) of the Medical Ethics Code to be incompatible with the Constitution. Hence, the proceedings concerning her constitutional complaint would in any event have been discontinued by that court as the issue had already been settled.

53. The Court has held that a constitutional complaint was an effective remedy for the purposes of Article 35 § 1 of the Convention only in situations where the alleged violation of the Convention resulted from the direct application of a legal provision considered by the complainant to be unconstitutional (see, among other authorities, *Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003; *Pachla v. Poland* (dec.), no 8812/02, 8 November 2005; and *Wypych v. Poland* (dec.), no. 2428/05, 25 October 2005).

54. In this connection, the Court first notes that by 2 September 2008, when the second-instance judgment was served on the applicant, the Constitutional Court had already declared that a strict interpretation of Article 52 (2) of the Code of Medical Ethics was incompatible with the Constitution in so far as it prohibited a truthful public assessment of the conduct of a doctor by another doctor in the public interest. It was considered to violate the constitutional norm securing the freedom of expression. The Court notes that section 39 § 1 of the Constitutional Court Act stipulates that that court shall discontinue its examination of a case if the challenged normative act has ceased to have effect prior to the delivery of a judicial decision by that court. It is therefore doubtful whether lodging a constitutional complaint at that time, concerning the same provision, would have served any useful purpose.

55. In any event, the Court observes that the breach of the Convention complained of in the present case cannot be said to have originated solely from the direct application of the legal provision referred to by the Government, namely Article 52 (2) of the Code of Medical Ethics. It notes that there was a four-fold legal basis for the penalty imposed on the applicant and, apart from paragraph 2, it also included paragraphs 1 and 3 of that provision which provided for separate disciplinary offences. The domestic court also referred to Article 1 (3) of that Code. Hence, the alleged breach resulted from the interpretation and application of a number of provisions, and not a single provision which could be deemed objectionable

from a constitutional point of view and challenged by way of a constitutional complaint.

Given the multiplicity of legal bases for the punishment imposed on the applicant and also bearing in mind that the Polish Constitutional Court lacks jurisdiction to examine the way in which the provisions of domestic law have been interpreted and applied in an individual case (see paragraph 37 above), the Court is of the view that it has not been shown that a constitutional complaint was, in the circumstances of the case, an effective remedy to which the applicant should have had recourse for the purposes of Article 34 of the Convention (see *Bobek v. Poland*, no. 68761/01, §§ 70-73, 17 July 2007; *Luboch v. Poland*, no. 37469/05, § 71, 15 January 2008; *Bugajny and Others v. Poland*, no. 22531/05, § 45, 6 November 2007).

56. Consequently, the Government's objection as to the exhaustion of domestic remedies must be rejected.

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. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

58. The Government submitted that the interference had been prescribed by law, namely by Article 52 of the Code of Medical Ethics, and that it had pursued the legitimate aim of protecting the reputation and rights of others.

59. They further submitted that the "interference" complained of had corresponded to a "pressing social need", that it had been proportionate to the legitimate aim pursued and that the reasons given by the national authorities to justify it had been relevant and sufficient (see *Skałka v. Poland*, no. 43425/98, § 35, 27 May 2003). The medical courts had established that the applicant had openly and persistently expressed negative opinions about the chief physician's qualifications in the presence of other doctors and medical staff, and even in the presence of patients and their families, which constituted an offence under Article 52 § 2 of the Code of Medical Ethics.

60. They further argued that medical practitioners enjoyed a special relationship with patients based on trust, confidentiality and confidence that the former would use all available knowledge and means to ensure the well-being of the latter. That could imply a need to preserve solidarity among members of the profession (see *Frankowicz v. Poland*, no. 53025/99, § 49, 16 December 2008).

61. The Government emphasised that the applicant had expressed negative opinions about the head physician's qualifications on account of the conflict between them. That conflict had deprived the applicant's statements of objectivity. Her views on her superior's professional performance could not therefore be seen as a reasonable critical assessment, from a medical point of view, of the treatment received by the patients from another doctor, but rather as gratuitous personal attacks.

62. The Government argued that during the disciplinary proceedings the medical courts had examined numerous pieces of evidence submitted to them.

63. The Government concluded that the domestic authorities, when justifying the interference concerned in the present case, had relied on grounds which were both relevant and sufficient.

64. The Government stressed that the applicant had been found guilty only in disciplinary proceedings. No civil or criminal proceedings on a public indictment had been instituted or even envisaged against her. Lastly, the penalty imposed on her had been one of the most lenient possible and concerned not only the breach of Article 52 § 2 of the Code of Medical Ethics but also other charges brought against the applicant. 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.

65. The applicant submitted that she had been penalised for having expressed her opinions concerning matters of clinical judgment which were of the highest importance for the patients and for disclosing the true facts relating to W.R.K.'s professional qualifications and conduct. The medical courts had unduly focused on the applicant's criticism of the conduct of a colleague, having completely failed to take into consideration the quality of diagnostic and therapeutic measures administered to the patients. They had failed to examine whether the applicant's acts had been intended to protect the patients' interests. The courts had been overly concerned with the protection of the applicant's former superior's reputation, to the detriment of everything else.

66. The applicant further emphasised that the findings of the medical courts had been completely inconsistent with the findings made by the labour court, both as to the facts and as to the law. She argued that this cast serious doubt on the former's correctness and lawfulness.

2. The general principles

67. 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).

68. 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; *Stambuk v. Germany*, no. 37928/97, §§ 43-52, 17 October 2002; and *Frankowicz v. Poland*, no. 53025/99, § 39, 16 December 2008).

69. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'... 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 relied on an acceptable assessment of the relevant facts..." (see, among many other authorities, Sunday Times (no. 1) *v. the United Kingdom*, 26 April 1979, § 62, Series A no. 30; *Guja v. Moldova* [GC], no. 14277/04, § 69, 12 February 2008).

70. 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).

3. The application of the general principles to the above case

71. The Court first observes that it is common ground between the parties that the reprimand imposed on the applicant by the Medical Court amounted to an interference with the exercise of her right to freedom of expression.

72. 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.

73. The Court observes that the interference was based on Article 1 paragraph 3 and Article 52 paragraphs 1, 2 and 3 of the Code of Medical Ethics. The medical courts found the applicant guilty of unethical conduct punishable under those provisions of the Code. The conduct was said to consist of: failure to comply with her superior's orders (paragraph 1); publicly making disparaging statements about her superior to the medical staff of the ward (paragraph 2); informing other doctors about what she perceived to be erroneous decisions on her superior's part and taking patients' medical records out of the hospital to show them to the regional consultant (paragraph 3); and inability to work in a medical team (Article 1 paragraph 3 of the Code) (see paragraph 27 above). The Court is of the view that only the issues arising in connection with offences of publicly making disparaging statements about her superior to the medical staff of the ward and informing other doctors about what she perceived to be erroneous decisions on her superior's part are relevant for the applicant's complaint under Article 10 of the Convention. Notwithstanding the fact that following the applicant's conviction the Constitutional Court held that a strict interpretation of Article 52 (2) of that Code was unconstitutional, the Court can accept, for the reasons outlined above (see paragraph 55) that the interference complained of was at the material time "prescribed by law" within the meaning of Article 10 of the Convention.

74. 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.

75. The Court will therefore examine whether the interference with the applicant's right to freedom of expression was necessary in a democratic society.

76. The Court has already held that matters relating to the practice of a profession practice are not removed from the protection of Article 10 of the Convention (see paragraph 68 above; see also *Frankowicz v. Poland*, cited above, § 9).

77. 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.

78. The Court notes that the applicant, a doctor in a public hospital, expressed concern in her letter of 16 September 2004 to the regional consultant about the correctness of diagnostic and therapeutic decisions made by her superior. She referred to concrete cases and provided detailed explanations as to why she was of the view that the quality of medical care given to those patients was open to criticism.

The Court further notes the findings of the labour court that the applicant, even prior to that letter, had already alerted the director of the hospital to what she perceived as shortcomings in the professional decisions made by W.R.K. That court had also found that the applicant had informed the director that she had shown the medical records of certain patients to the regional consultant and that the director had not formulated any objections with regard to that action. Hence, the Court is satisfied that the applicant took steps with a view to drawing the attention of the competent authorities to what she perceived as a serious dysfunction in the work of her then superior.

79. The Court is well aware that the applicant and her superior were in a long-standing conflict. This is not in dispute and has been confirmed by various pieces of evidence which were before the domestic courts. However, the Court does not share the Government's conviction that the background to that conflict automatically divested the negative statements made by the applicant about her superior of all objectivity and legitimacy. It should be noted that the case before the medical authorities did not concern any negative statements about W.R.K.'s character or gratuitous attacks against her. The domestic courts did not find that the applicant had personally insulted the head physician in any way. The applicant was penalised essentially for the fact that she had expressed concerns, to persons working in the ward, to the hospital's authorities and to the regional consultant, about the quality of medical care given to patients on her superior's orders.

80. The Court has previously acknowledged, in the context of the legal profession, 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 to ensure the well-being of the latter. That can imply a need to preserve solidarity among members of the profession (see *Frankowicz v. Poland*, cited above, § 49).

81. However, 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). On no occasion during the domestic proceedings was it established that the applicant's clinical judgment was deficient, or that she lacked professional skills. Indeed, the labour court, in its judgment of 22 December 2005, found that the applicant was a very good specialist (see paragraph 11 above). Furthermore, at no time did the disciplinary courts address the question whether the applicant's statements had been made in good faith.

The medical courts failed to address in their decisions the question of whether the applicant's concerns had been justified. They rather focused on the mere fact that the Code of Medical Ethics as it stood at the material time prohibited criticism of other colleagues.

82. Such a strict interpretation of the domestic law by the disciplinary courts 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). The Court has already found, in another case against Poland (*Frankowicz v. Poland*, cited above) in which the application of Article 52 (2) of the Code of Medical Ethics was concerned, that 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 medical profession - that is to protect the health and life of patients.

83. 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 a critical assessment, from a medical point of view, of treatment received by patients from another doctor. Thus, it concerned issues of public interest.

84. Lastly, the Court has also been struck by the fact that the medical court paid no heed to the findings of the labour court. It could reasonably be expected that certain passages in the reasons of the latter's judgment could have been referred to by the medical court as they were highly pertinent for the findings of fact to be made and also for the legal assessment of the situation. In particular, the medical court found the applicant guilty of amending medical records without informing her superior (see paragraph 28 above). This does not sit well with the finding made by the labour court that in 2004 the hospital's director had reviewed the medical records of the ward's patients and found no irregularities (see paragraph 12 above). Nor does it appear compatible with the labour court's conclusion that these allegations had not been confirmed by the evidence (see paragraphs 13 and 14 above). It is further noted that the medical court found the applicant guilty of an offence punishable under Article 52 (3) of the Code of Medical Ethics in that she had improperly taken the medical records out of the hospital to show them to the regional consultant (see paragraph 27 above). The findings of the medical court in this respect are also incompatible with the findings of the labour court which held that such conduct was expressly recommended by the Law on the Profession of Physicians (see paragraph 14 above).

85. The Court is of the view that such serious discrepancies between, on the one hand, the judicial decision delivered by the court in civil proceedings following a fair procedure and, on the other, the decision of the

medical court must be seen as detracting from the authority of the latter decision.

86. To sum up, the Court takes the view that the grounds relied on by the medical courts were neither relevant nor sufficient.

87. In conclusion, the Court considers that the interference complained of was not proportionate to the legitimate aim pursued and, accordingly, was not "necessary in a democratic society". Consequently, it gave rise to a violation of Article 10 of the Convention.

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

88. The applicant complained that her right to a fair hearing had been breached. The judgment of the District Court confirmed the applicant's submissions concerning her efforts to protect the patients' interests. The findings of fact of the labour courts had concerned the same events as those discussed in the disciplinary case and had been of a great relevance for the latter's outcome. Had they been duly taken into consideration by the Regional Medical Court, they would have helped the applicant to refute the allegations made against her.

89. The Government contested that argument.

90. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

91. However, having regard to the finding relating to Article 10 of the Convention (see paragraph 87 above), the Court considers that this part of the application raises no issues separate from those which have already been examined in connection with the complaint under Article 10 of the Convention.

92. It is therefore not necessary to examine whether there has been a violation of Article 6 of the Convention in this regard.

93. The applicant further submitted that the Medical Court had disregarded her motion for evidence to be taken from the case file of the labour case and that it had failed to call her witnesses and had only heard witnesses who testified against her. She further complained that the regional medical court was not impartial, given that W.R.K.'s husband was one of the Regional Attorneys for Professional Liability.

94. The Government disagreed.

95. The Court notes that the file of the labour law case was included in the file of the disciplinary proceedings (see paragraph 26 above). It further observes that it has not been shown that the W.R.K.'s husband was in any way involved in the proceedings against the applicant. Therefore, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that this complaint does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

97. 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

98. The applicant claimed EUR 50,000 in respect of non-pecuniary damage. This sum covered damage caused to her by the disciplinary proceedings against her and the anguish and damage to her professional reputation.

99. The Government submitted 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.

100. The Court considers 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

101. The applicant also claimed PLN 1,440 for the costs and expenses incurred before the domestic courts.

102. The Government contested this.

103. 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 were 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 applicant's claim in full. It therefore awards EUR 360 to the applicant.

C. Default interest

104. 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 as regards the complaints under Articles 10 and 6 of the Convention (alleged failure of the Regional Medical Court to take account of the Labour Court's findings) and the remainder inadmissible;

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

3. *Holds* that there is no need to examine the complaint under Article 6 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, the following amounts, to be converted into Polish zlotys 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 360 (three hundred and sixty 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;

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

Done in English, and notified in writing on 18 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President