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Ó Fathaigh, R.

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Brzeziński v. Poland: Fine over 'false' information during election campaign violated Article 10

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By *Ronan Ó Fathaigh*

On 25 July 2019, the European Court of Human Rights delivered an important judgment in *Brzeziński v. Poland* (<http://hudoc.echr.coe.int/eng?i=001-194958>), concerning a provision in Poland's election law which allows a court, within 24 hours, to consider whether 'untrue information' has been published, and to issue an order prohibiting its further distribution. The European Court in *Brzeziński* unanimously held that a fine issued under the provision violated the right to freedom of expression, under Article 10 of the European Convention on Human Rights.

The case arose in the run-up to local elections in Poland in 2006, and involved Zenon Brzeziński, a candidate in local government elections in southern Poland. During the campaign, Brzeziński produced an election booklet which criticised members of the outgoing local government. The booklet discussed poor local water and sewage systems, and criticised the mayor ('J.Ś.') for implementing unfavourable contracts with a water company, stating that 'despite having announced in public that he had rescinded those contracts', the mayor had done so in an 'amateurish way, delaying their termination by years'. The booklet also criticised another local councillor ('J.K.') for having received 'municipal subsidies for a company she managed'. On a Sunday morning before the elections, Brzeziński distributed a 'large number' of the booklets to churchgoers leaving a local Sunday mass.

Following the booklet's distribution, the mayor and councillor brought an action against Brzeziński under Section 72 of the Local Elections Act. The provision allows candidates to apply to a Regional Court for an order restraining publication of campaign material or statements containing 'untrue data or information', with the court required to examine the application 'within 24 hours'. The mayor and councillor sought a court order under Section 72, requiring Brzeziński to correct 'untrue information' in the campaign booklet, and prohibit further distribution of the booklet.

On the morning of 27 October 2006, Brzeziński was summoned by telephone to attend a court hearing scheduled for 13.30 the same day, at Częstochowa Regional Court. Brzeziński was unable to attend, but the Regional Court delivered its decision a few hours later, finding the booklet had been 'untrue', 'malicious', and 'exceeded the permissible forms of electoral propaganda'. The Court held that accusing the mayor of 'unprofessionalism' in the contract termination was 'unfounded'; and in relation to the councillor, there was no 'conflict of interest' over receiving municipal subsidies and being on the receiving company's board. The Court issued an order prohibiting Brzeziński from

distributing the booklet further; and ordered him to publish an apology in two local newspapers, which read that he 'regrets that the above-mentioned untrue information was made public, since it could have misled public opinion'. The Court also ordered Brzeziński to pay a sum to charity, and costs. The Regional Court's judgment and orders were ultimately upheld by the Katowice Court of Appeal.

Brzeziński made an application to the European Court in 2007, claiming a violation of his right to freedom of expression, but it took over 12 years for the case to make its way to a judgment. Ultimately, though, the European Court unanimously held that there had been a violation of Article 10. The Court considered that the election law provision was 'prescribed by law', pursued the legitimate aim of the 'protection of the reputation or rights of others', and the main question for the Court was whether the interference with Brzeziński's freedom of expression had been 'necessary in a democratic society'.

First, the Court noted that the campaign booklet was published during a local election campaign, targeting local government and elected officials, and concerning a matter of 'undoubted' public interest: local government management. The Court reiterated that under Article 10, there was 'little room' for restrictions on such public interest expression, the elected officials targeted were subject to 'wider' limits of acceptable criticism, and that as Brzeziński was speaking as an election candidate, the government's margin of appreciation for restricting such expression was 'very limited'.

The Court then reviewed the Polish courts' decisions, and in particularly scathing language, noted that Brzeziński's statements had been 'immediately classified as lies' by the Polish courts, and '[i]t did not appear from the reasoning of the domestic courts that they had examined whether the impugned remarks had a sufficient factual basis'. The Court considered that Brzeziński was 'clearly involved in a public debate on an important issue', and the Court was 'unable to accept the domestic courts' view that [Brzeziński] was required to prove the veracity of his allegations', and '[b]y following such an approach the domestic courts effectively deprived [Brzeziński] of the protection afforded by Article 10'. Crucially, the Court held that the language used in the booklet was not 'vulgar or insulting', and was within the limits of 'exaggeration and provocation' and the 'ordinary tone' of 'political debate at local level'. Based on the forgoing, the Court held that the reasons given by the Polish courts for the judgments against Brzeziński 'did not correspond to any pressing need'.

The Court also examined the sanctions imposed, noting that not only was an order issued prohibiting dissemination of the booklet, Brzeziński was also obliged to apologise and rectify the 'inaccurate information' by publishing a statement on the front page of two local newspapers, in addition to being ordered to pay costs and a sum to charity. The Court held that the 'cumulative application' of these sanctions 'would likely have a chilling effect on individuals engaged in local political debate'. The Court unanimously concluded that there had been a disproportionate interference with Brzeziński's free expression, in violation of Article 10.

Comment

Given the total absence of Article 10 political expression principles having been applied by the domestic courts in the Section 72 proceedings against Brzeziński, it is not surprising that the *Brzeziński* judgment was delivered by a three-judge Committee of the European Court. This was an application of the simplified procedure under Article 28 of the European Convention, where a Committee may, by a unanimous vote, declare an application admissible and 'render at the same time a judgment on the merits', if the underlying question is 'already the subject of well-established case-law of the Court'.

There was indeed 'well-established case-law', with the Court having twice before found similar proceedings under Section 72 targeting election-time expression as violating Article 10. The first was

the unanimous judgment in *Kwiecień v. Poland* (<http://hudoc.echr.coe.int/eng?i=001-78876>), where the Court found serious deficiencies under Section 72 'untrue information' proceedings, including that the domestic courts (a) did 'not carry out the relevant balancing exercise', (b) did not give 'any consideration' to a number of Article 10 political expression principles, and (c) had not 'sufficiently examined the evidence adduced'. The Court even held that the 'fairness of the proceedings may be called into question'. Similarly, in *Kita v. Poland* (<http://hudoc.echr.coe.int/eng?i=001-87424>), the Court unanimously found a violation of Article 10 over Section 72 proceedings, holding that the Polish courts 'unreservedly qualified all of [the statements] as statements which lacked any factual basis', and the 'standards applied' by the Polish courts were 'not compatible with the principles embodied in Article 10'. The unanimous judgments in *Kwiecień* and *Kita* were both joined by the former President of the Court, Judge Nicolas Bratza. Coupled with *Brzeziński*, it is fair to say that there is a serious Article 10 problem with Section 72 proceedings targeting supposedly 'untrue information' during election time.

However, the *Brzeziński* judgment was curious in one respect, and that was the Court's dismissal of Brzeziński's procedural claim under Article 10 that because he was summoned 'three hours' before the beginning of the Section 72 hearing, this prevented him from attending and properly 'defend[ing] himself'. The Court rejected this submission, and relying upon a domestic court finding that Brzeziński had communicated 'no obstacle to his personal appearance in court' when he was summoned by telephone, the European Court held that the 'impossibility' of presenting his case could not be 'attributable to the national authorities alone'. Further, the Court also rejected Brzeziński's claim under Article 6 of the European Convention (right to a fair trial), that the Section 72 proceedings were 'unfair', with the Court simply stating that it was 'not necessary to consider whether, in the present case, there has been a violation' of Article 6, given the finding of a violation of Article 10.

The Court thus demonstrated a marked reluctance to tackle the nub of the issue: the obvious problems that flow from a provision like Section 72, which requires a court to deliver a judgment within 24 hours, on whether 'untrue information' has been published. It must be pointed out that in *Kwiecień*, the Court specifically noted that provisions like this serve the 'legitimate goal of ensuring the fairness of the electoral process and as such can not be questioned from the Convention standpoint'. However, the Court added an important proviso: it should not 'result in the undue curtailment of the procedural guarantees afforded to the parties to such proceedings, in particular the defendants'. Curiously, the Court in *Brzeziński* did not apply this principle when addressing Brzeziński's claim that a three-hour notice period rendered the proceedings unfair, and simply stating that his non-appearance was not 'attributable to the national authorities', does not address the central question: is a three-hour notice period to prepare a defence to civil court proceedings over 'untrue information' an undue curtailment of procedural guarantees of fairness?

Finally, *Brzeziński* is the first judgment from the European Court where the judges use the term 'fake news'. Neither the Polish government, nor Brzeziński, used the term in their submissions, with the Court introducing the term of its own volition, stating: the summary nature of the procedure in question is 'justified by the need to ensure that "fake news" and remarks that undermine the reputation of election candidates and which are likely to distort the result of the vote are rectified as quickly as possible'. Of course, no authority was cited for this principle. The use of the term 'fake news' was incredibly disappointing, given that independent reports from both the Council of Europe (here (<https://rm.coe.int/information-disorder-report-november-2017/1680764666>)) and the European Union (here (https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=50271)) have found that the term should not be used, as it is 'woefully inadequate', 'misleading', 'appropriated by politicians around the world to describe news organisations whose coverage they find disagreeable', and a 'mechanism by which the powerful can clamp down upon, restrict, undermine and circumvent the free press'. Hopefully *Brzeziński* is the last time a European Court judge uses such a term in a Court

judgment or decision.

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